BURIAL AND OTHER CHURCH FEES

AND

THE BURIAL ACT 1880

J. THEODORE DODD

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BURIAL AND OTHER CHURCH FEES

AND

THE BURIAL ACT, 1880.

WITH NOTES.

BY

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PREFACE.

As the new Burials Act preserves all previous rights to Fees, it seems advisable to treat of Fees in connection with that Act. And it appears convenient to discuss other Church Fees at the same time. I have to acknowledge my deep obligation to the learned work of Sir Robert Phillimore. I have cited this as "Phillimore," and Phillimore's Reports as "Phill. Rep." Many of the Cases have been very fully set out, partly to save the reader trouble in reference, and partly because it is often important to give not only the decision but the grounds on which such decision was based. A full table of contents is prefixed, which, it is hoped, will be found useful. Fees in Cemeteries are not included in this work.

J. THEODORE DODD.

25, CHANGE ALLEY, SHEFFIELD.
December, 1880.

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BURIAL AND OTHER CHURCH FEES.

CHAPTER I.

INTRODUCTORY.

Ecclesiastical law.

THE ecclesiastical law of England is compounded of four main elements—the civil or ancient Roman law, the canon law, the common law, and the statute law or Acts of Parliament. When these laws clash the Roman law submits to the canon law, both of these to the common law, and all these to the statute law (*a*).

The canon law.

The rise of the canon law is involved in some obscurity. Sir Henry Maine states his opinion to be that the Imperial Roman law did not satisfy the morality of the Christian communities, and that this is the most probable reason why another body of rules grew up by its side, and ultimately almost rivalled it. The whole of the foreign canon law has never been received in this realm, but a considerable portion of it has been accepted. Beside the foreign canon law we have our own legatine and provincial constitutions.

The legatine constitutions.

The legatine constitutions were made and published within this realm in the times of the legates

(*a*) Burn, Preface, p. xv.

Chap. I.

Otho and Othobon, and were commented upon by John de Athon.

The provincial constitutions.

The provincial constitutions were made in Convocation in the times of the Archbishops of Canterbury, from Stephen Langton to Henry Chicheley; containing the constitutions of those two archbishops, and of several intermediate archbishops, viz., Richard Whethershed, Edmund of Abingdon, Boniface, John Peckham, Robert Winchelsea, Walter Reynolds, Simon Mepham, John Stratford, Simon Islip, Simon Langham, Simon of Sudbury, and Thomas Arundel. These were collected by Lyndwood, and their value increased by his learned exposition. Lyndwood was official of the Court of Canterbury, and afterwards Bishop of St. David's, in the reign of Henry V. And these constitutions, although made only for the province of Canterbury, were received also by the province of York in Convocation in the year 1463. There were other constitutions which have been considered of less importance (*b*).

52 Henry VIII. c. 19.

In the reign of Henry VIII. it was enacted that the canons and constitutions then in force should so continue, so far as they were not contrary to the laws, customs, or statutes of the realm, or the royal prerogative, until a revision should be made.

The Reformatio Legum.

A revision was attempted by the *Reformatio Legum*, but this work never received any legal sanction, although it is often quoted for the purpose of showing the opinions of the time.

(*b*) Burn, Preface, p. xxx.; Kemp *v.* Wickes, 3 Phill. Rep. 264.

Chap. I.

The canons of 1603.

It was held by Lord Hardwicke, in Middleton *v.* Croft (*c*), that the Canons of 1603 do not *proprio vigore* bind the laity. His lordship stated, however, that there were many provisions in those canons, which are declaratory of the ancient usage and law of the Church of England, which would bind the laity. It seems that these Canons bind the clergy in Ecclesiastical things (*d*). They were made by Convocation and confirmed by the Crown.

The rubrics.

The Rubrics of the Prayer Book being incorporated in the Act of Uniformity, 13 & 14 Charles II. c. 4, have the force of statute law (*e*).

(*c*) Str. 1056; 2 Atk. 650; see also Bishop of Exeter *v.* Marshall, 3 L. R., H. L., 17.

(*d*) Escott *v.* Mastin, 4 Moore, P. C. C. 104; compare 4 L. R., A. & E. 489; and Phillimore, 1959.

(*e*) Escott *v.* Mastin, *ubi sup.*

CHAPTER II.

FEES FOR BAPTISM.

Chap. II.

The old law.

IT has always been a maxim of Ecclesiastical Law that no Sacrament of the Church shall be denied to anyone on account of non-payment of any fee (*f*), though it is said that Immemorial Custom may warrant the demand for a fee after the Sacrament has been performed (*g*). And, of course, a fee may be authorised by Act of Parliament (*h*). Sir R. Phillimore states that in England the exception to the general law with respect to Baptism appears never to have been admitted (*i*). There is an old case of a Curate of Bridlington claiming a fee of 1*s*. for baptising the child of a Parishioner. The Court granted a Prohibition (*j*). Demanding money for Sacraments was considered a species of simony. By the Canon Law it seems to have been a cause for deprivation (*k*).

In many churches fees for baptism and registration are expressly forbidden by Acts of Parliament (*l*).

(*f*) Lyndwood, 278; see p. 7, below.
(*g*) See p. 12.
(*h*) See p. 49.
(*i*) Phillimore, Eccl. Law, 664.
(*j*) Ayl. Parergon, 106.
(*k*) Burn, tit. "Deprivation."
(*l*) 6 & 7 Vict. c. 37, s. 15; see also 14 & 15 Vict. c. 97, s. 17, and 13 & 14 Vict. c. 41, s. 34 (Manchester), and page 53.

Any fee must have been a gross abuse. Nothing in the Prayer Book authorises any offering; and the 68th and 69th Canons of 1603, which concern baptism, mention no fee. It is, however, only fair to say that several Acts of Parliament mention fees for baptism as though existing. Lord Stowell, a great authority on ecclesiastical law, appears, in one case, to have sanctioned the charge of a fee of 1*s.* for registration of baptism (*m*). It is difficult to see how any fee for registration of baptism could be legal, as "registration of baptism has originated within legal memory" (*n*).

No fee for registration.

The keeping of baptismal registers began in the thirtieth year of the reign of Henry VIII. Canon 70 of 1603 requires a register to be kept. In the reign of William III. an Act was passed "for granting to His Majesty certain rates and duties upon marriages, births, and burials, and upon bachelors and widowers, for the term of five years, for carrying on the war against France with vigour" (*o*).

To assist the collection of the tax it was ordered that a register of marriages, burials, christenings, and births should be kept by the clergy.

This Act has, of course, ceased to be in force. The Statute which now requires that baptism registers should be kept by the clergy is 52 Geo. III. c. 146, s. 1.

(*m*) Gilbert *v.* Buzzard, 3 Phill. Rep. 335, 367; see also King *v.* Alston, 18 L. J. N. S. Q. B. 59; 12 Q. B. (A. & E.) 982.

(*n*) *Per* Coleridge, J., 12 Q. B. (A. & E.) 982.

(*o*) 6 & 7 Will. III. c. 6.

Chap. II.

None of these Acts authorise the charge of any fee for baptism or registration.

The present law.

It seems needless to say more on the subject, as an Act has recently been passed, which will, in almost every case, abolish any possible claim to fee for baptism or registration.

35 & 36 VICT. CHAP. 36.

An Act to render it unlawful to demand any fee or reward for the celebration of the sacrament of baptism, or the registry thereof.

Whereas doubts have been entertained whether in certain churches and chapels of the Church of England as by law established, under the authority of certain local Acts of Parliament or custom, fees may not now be demanded for the administration of the sacrament of baptism, or for the due registration of such administration:

And whereas it is expedient that such doubts should not exist:

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. That from and after the passing of this Act, it shall not be lawful for the minister, clerk in orders, parish clerk, vestry clerk, warden, or any other person, to demand any fee or reward for the celebration of the Sacrament of baptism, or for the registry thereof:

Provided always, that this Act shall not apply to the present holder of any office who may at the present time be entitled by any Act of Parliament to demand such fees.

This Act came into force on the 18th of July, 1872.

No claim by *Custom* can therefore any longer be made. A person claiming under an Act of Parliament would have to show that he held office at the date of the passing of the Act, and also show under what Act of Parliament he claimed.

CHAPTER III.

FEES FOR MARRIAGE.

No fee is due for marriage, either by common or canon law, but a fee may be due either by the immemorial custom of the particular parish or by Act of Parliament (*p*). By the Constitution of Archbishop Langton (*q*):—

None due by common or canon law, but only by custom or Act of Parliament.

"We do firmly enjoin that no sacrament of the Church shall be denied to anyone upon the account of any sum of money, nor shall matrimony be hindered therefore; because if anything hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the Churches by the Ordinary of the place afterwards." Before the Reformation it was held that there were seven sacraments, and that matrimony was one. No change was made at the Reformation which could impose a fee for marriage in any case where none was previously due.

The rubric.

By the Rubric in the marriage service the man is directed to "give the woman a ring, laying the same upon the book with the accustomed duty to the priest and clerk."

In the first Prayer Book of Edward VI. (1549) the Rubric ran—"The man shall give unto the woman a

(*p*) See pp. 12, 49.

(*q*) Lynd., lib. v. tit. 2, p. 278; see p. 11, below.

Chap. III.

ring and other tokens of spousage, as gold or silver, laying the same upon the book."

The man then said to the woman, "With this ring I thee wed, this gold and silver I thee give."

The old Latin Rubric was "Deinde ponat vir aurum, argentum, et annulum, super scutum vel librum" (*q*), and the man was directed to say, "With this ringe I thee wed, and this gold and silver I thee give."

It seems not improbable that it was customary that the money laid upon the book should become a gift to the priest.

The second Prayer Book of Edward VI. (1552) has the same rubric as that now in force.

It would appear from the books, notwithstanding the provisions of the Rubric, that a clergyman has *not* a right to refuse to marry because the fees are not paid (*r*).

(*q*) The Sarum Manual (Surtees Society, vol. 63, p. 19*) and the York Manual (*ib.* p. 27) read as in the text. The Pontifical in the Library of Magdalen College, Oxford, of the 12th century reads:—"Postea Sacerdos det sponsæ suæ per cultellum dotem. Deinde ponatur annulus cum denariis desponsalibus super scutum et benedicantur (*sic*)," (*ib.* p. 160*); and directs the bridegroom to say, "Istud argentum tibi do." An Ely Pontifical of the same century mentions both gold *and* silver (*ib.* 161*), so does a Worcestershire Missal of the 13th century (*ib.* 163*). A 15th century M.S. reads:—"Tunc distribuat argentum vel denarium clericis vel pauperibus secundum consuetudinem villæ vel patriæ" (*ib.* 166*). A Welsh Manual, 15th century, reads:—"Aurum vel argentum seu cetera" (*ib.* 167*). The Hereford Missal:—"Argentum sive aurum seu cetera," Edit. 1874, p. 437. The Sarum Missal, Burntisland Edit. 1861, p. 831,* has "aurum *vel* argentum."

(*r*) Cripps, 699. See also Lyndwood, lib. v. tit. 2, p. 279. It would seem from Escott *v.* Mastin, 4 Moore, P. C. C. 104,

Moreover the fee must be a reasonable one. In an agricultural parish, 10*s.* for the clergyman and 3*s.* for the clerk has been declared unreasonable (*s*). Fees must be reasonable.

An incumbent cannot claim a fee on the marriage of a parishioner who is married in the Church of another parish. Such a claim would be held unreasonable (*t*).

The Report of the Royal Commission on the Laws of Marriage (1868) states that fees for marriages by banns, "varying in different places, and often of doubtful legality, are by custom payable" (*u*). This report was signed by Lords Chelmsford and Cairns, and other distinguished lawyers (*v*). As to marriage in parishes which have been divided, see Chapter IX., pages 56 and 58.

Marriage licence.

The cost of an ordinary licence for marriage varies in different dioceses from about £2 to £3. This includes the stamps. A "special" licence is said to cost nearly £30.

that the Court will construe rubrics according to the old law, where reasonably practicable. See also Kemp *v.* Wickes, 3 Phill. Rep. 264.

(*s*) Bryant *v.* Foot, 3 L. R. Q. B. 497; see p. 18.

(*t*) Patten *v.* Castleman, 1 Lee Ecc. Rep. 387. Thomson *v.* Davenport, Lutw. 1059. Blackstone, iii. 90. See pp. 13, 16.

(*u*) Page vi.

(*v*) Page liii.

CHAPTER IV.

FEES FOR CHURCHING OF WOMEN.

Chap. IV.

No fee due except by custom or Act of Parliament.

No fee is due for churching except by immemorial custom of the particular parish or place, or by Act of Parliament (*w*).

The rubric.

By the Rubric at the end of the service—"The woman that cometh to give her thanks must offer accustomed offerings."

Where the service is not performed a fee cannot be claimed (*x*).

Dean Hook, in his Church Dictionary, under the heading, "Churching of Women," remarks:—

> The rubric at the end of the service appoints that the woman that cometh to give her thanks must offer accustomed offerings . . . . it is greatly to be desired that it were well understood that the offering thus required is of the nature of a thank-offering to Almighty God, and that it is not in any sense a fee for the baptism (*y*) of the new-born child which usually takes place at the same time.

(*w*) See pp. 12, 49, 52. Compare pp. 23, 81—83.

(*x*) Naylor *v.* Scott, Ld. Raymond, 1558; Blackstone, iii. 90. See pp. 8, 13, 17.

(*y*) See Chapter II. p. 6.

CHAPTER V.

BURIAL FEES DUE BY CUSTOM.

Ordinary burial.

FEES for ordinary burial in the churchyard are either claimed after (*z*) reading the service or breaking the soil. Fees for special privileges, such as burial in a vault, or for the erection of a tombstone, or for burial in a churchyard in which the deceased has no right of burial, will be considered in Chapters VI. and VII.

Canon law.

By the canon law fees for burial were forbidden, and were even called simoniacal (*a*). Consecrated ground was considered sacred, and money payment for it was considered simoniacal (*b*).

However, the canon law permitted offerings which were at first voluntary, and soon the laity were urged to observe pious customs (*c*).

Constitution of Archbishop Langton.

The constitution of Stephen Langton, Archbishop of Canterbury (A.D. 1222), annotated by Lyndwood, is as follows (*d*):—

"We do firmly enjoin that burial shall not be denied to any one upon the account of any sum of money; because if anything hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the Churches by the Ordinary of the place afterwards" (*e*).

(*z*) See the last line of this page.
(*a*) Selvag. ii. p. 120; Ayl. Parerg. 134; Lynd. 278, p. 81, *inf.*
(*b*) Gilbert *v.* Buzzard, 3 Phill. Rep. 335, 360.
(*c*) Selvag. ii. 121; Gibson, 541. See p. 23, *inf.*
(*d*) Lynd. lib. v. tit. 2, p. 278. See Johnson ii. 112, 156.
(*e*) See p. 61.

Chap V

Denied]. Neither shall it be delayed.

Burial]. For burial ought not to be sold; but albeit the clergy may not demand anything for burial, yet the laity may be compelled to observe pious and laudable customs. But in such case the clerk must not demand anything for the ground, or for the office; but if he shall allege that for every dead person so much has been accustomed to be given to the Minister (*f*) or to the Church, he shall recover it.

Accustomed]. That is of old, and for so long time as will create a prescription, although at first given voluntary. For they who have paid so long are presumed at first to have bound themselves voluntarily thereunto.

No fee due except by immemorial custom or by Act of Parliament.

It is clear from the following cases that no fee is due, either for burial service or ordinary interment in the churchyard, except by virtue of *immemorial* custom or by Act of Parliament. The custom must be such as to satisfy the stringent requirements of the Civil Courts; it is not sufficient that it should be such as would be valid in the Spiritual or Ecclesiastical Court (*g*). As to fees due by Act of Parliament, see Chapter VIII., page 49.

Burdeaux *v.* Lancaster.

"Burdeaux, a French Protestant, had his child baptised at the French Church in the Savoy, and Dr. Lancaster, Vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2*s.* 6*d.* due to him, and 1*s.* for the clerk.

(*f*) Presbytero.
(*g*) See below, pp. 13, 34.

A prohibition was moved for, and Levinz urged this was an ecclesiastical fee due by the canon."

"Holt, C. J.— Nothing can be due of common right, and how can a canon take money out of laymen's pockets? Lyndewode says: 'Tis simony to take anything for christening or burying, unless it be a fee due by custom;' but then a custom for any person to take a fee for christening a child, when he does not christen him, is not good; like the case in *Hobart*, where one dies in one parish and is buried in another, the parish where he dies shall not have a burying fee" (*h*).

Dean and Chapter of Exeter's Case.

"Serjeant Hooper showed cause against a rule for a prohibition to the Spiritual Court, to stay a suit there for a customary fee of £10 due to the Dean and Chapter of Exeter for burying in the cathedral church, *sed non allocatur*. For no fee is due for burial of common right, but where a licence is necessary the person giving it may stand upon his own price, and if there be such a custom it is triable at common law. *Vide* 3 Keble, 527, 533. If the custom be not denied, the Spiritual Court shall proceed, for there is no other remedy; but if the custom be denied, a prohibition shall go, not *propter defect. jurisdictionis*, but *triationis*, and that burials at common law ought to be in the churchyard and without fee. 2 Keble, 778, *contra*" (*i*).

Spry *v.* Gallop.

In Spry *v.* Gallop, the plaintiff brought an action for a fee of 1*s.* 6*d.* for performance of the burial service. The judgment of the court in favour of

(*h*) Burdeaux *v.* Lancaster, 1 Salkeld, 332.

(*i*) Dean and Chapter of Exeter's case, 1 Salkeld, 334.

Chap. V

the defendant was delivered by Pollock, C.B., as follows:—

"It is perfectly well settled that such a fee, being for the performance of the burial service, is not due by common right, and can be legally due only by immemorial custom of the particular parish, or by the provisions of some Act of Parliament. . . . . It remains for us to observe that, supposing an immemorial custom to pay a fixed fee for burial as a surplice fee (which is essential to make it legal) had been established, the proper remedy against the party liable to pay it for non-payment seems to be in the Spiritual Court (Dean of Exeter's case). It is true, that, if the defendant should be liable for it, and the custom were disputed, a prohibition would be granted if applied for, not *propter defectum jurisdictionis*, but *triationis* (*j*), the Spiritual Court not being competent to try a custom, as they used to establish one after an user of forty years or less (Andrews *v.* Smith); whereas the common law requires it to have been from time of legal memory; but still, when established by trial at common law, a consultation would be awarded, and the Spiritual Court would proceed as it would if the custom were not denied. In recent times the Spiritual Court, in order to avoid a prohibition, and endeavouring to conform to the rules of the common law, in the first instance inquires into the immemoriality of the custom; and this explains the judgment of Dr. Lushington, in the case in 2 Curteis, 5, in which he treats it as a necessary part of the inquiry whether

(*j*) See Andrews *v.* Symson, 3 Keb. 527.

the burial fee has existed beyond the time of legal memory. This observation does not apply to the case where the fee has been paid to some one, and the minister seeks to recover from the receiver, for the Spiritual Court has no jurisdiction in that case, and it must necessarily be the subject of a common law suit" (*k*).

Andrews v. Cawthorne.

In Andrews *v.* Cawthorne (*l*) it was held that no burial fee is due by canon law or at common law, but it might be due by the custom of the particular parish. In this case Mr. Justice Abney pointed out that no ancient or modern canon fixed, or pretended to fix, any fee either for sepulture or the burial office, and that no canon could fix any fee.

Limitation of rights of parishioners.

The common law gives only a right to simple burial. It does not give a parishioner any absolute right to a brick grave or to burial in an iron or lead coffin (*m*).

Mandamus to bury.

The Civil Court will grant a Mandamus to bury a person dying within the parish, but it will not grant a Mandamus to bury in an iron coffin, or any other unusual mode, or for the burial service. The mode of burial is of ecclesiastical cognizance (*n*)

In one instance the Ecclesiastical Court approved and supported a fee of £10 for a Parishioner and £20 for a Non-parishioner, in addition to the ordinary fees, for burial in a coffin of any description of metal (*o*).

Immemorial

To make a custom of legal validity in the civil

(*k*) Spry *v.* Gallop, 16 M. & W. 716; 16 L. J. N. S. Exch. 218.
(*l*) Willes, 536.
(*m*) Gilbert *v.* Buzzard, 3 Phill. Rep. 352, 358.
(*n*) Rex *v.* Coleridge, 2 B. & Ald. 806.
(*o*) Gilbert *v.* Buzzard, 3 Phill. Rep. 335, 366.

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custom explained.

courts it must be such that it will be presumed to have existed from the time of Richard I. (A.D. 1189). It is not meant that it must actually be proved to have existed then, or indeed that it need be shown that it is likely to have existed then; that would of course be generally impossible. But if evidence is brought showing that the custom has existed for a considerable period, say forty or fifty years, and no evidence is brought to show that the custom commenced since 1189, then, unless it is practically impossible that the custom should have existed at that date, the court will hold the custom is "immemorial." A custom to be valid must also be continuous, and have been kept, or submitted to, peaceably.

Custom must be reasonable.

It must also be reasonable, or rather it must not be positively unreasonable, in the eye of the law.

Lord Coke, after stating that a custom must be reasonable, thus explains himself (*p*):—

"This is not to be understood of every unlearned man's reason, but of artificial and legal reason warranted by authority of law. *Lex est summa ratio.*"

It is not necessary that a good reason should be shown for a custom. It is sufficient that no good reason can be shown against it. The rule is rather that it must not be extremely unreasonable. Some examples are given below (*q*):—

Examples of customs.

A custom that every man inhabiting within the parish of A. who marries by licence in another parish shall pay 5*s.* to the rector of A., for and in regard of the said marriage, as if it had been solemnised in A., is bad (*r*).

(*p*) Co. Litt., 62.

(*q*) See Bac. Abr. tit. "Custom," vol. ii. 568.

(*r*) Richards *v.* Dovey, Willes, 622.

A custom that a person shall pay the churching fee, though the ceremony be not performed, is bad (*s*).

But a custom that every inhabitant of a parish of the age of sixteen (of whatever religious sect) shall pay 4*d.* yearly as an Easter offering, is good (*t*).

A custom that if a person die in the parish, and be buried elsewhere, a burial fee shall be paid to the parson of the parish where he died, is bad (*u*).

This was decided on the ground that such person might only be a traveller and not a parishioner.

A custom in a parish, that every parishioner shall bury his relations in the churchyard as near as possible to their ancestors, is bad (*v*).

Wherever the party bound by a custom has some benefit by it, or the party who claims the advantage of it is at some charge thereby, the custom is good (*w*).

Requisites to make a legal custom.

A custom must be certain. It may, however, vary in different places, or rather different places may have different customs. Customary fees may vary in different parishes. A custom must be compulsory, so that a custom that everyone should pay what fee he liked would be bad. A custom cannot prevail against a statute. A valid custom can override the canon law, and it can prevail against the common law. In fact, the common law is the general custom of the realm; the custom is the common law of the particular place. A most important result of the above-mentioned rules as to a valid custom is that customary fees must not be unreasonably large.

(*s*) Naylor *v.* Scott, Lord Raymond, 1558.
(*t*) Fuller *v.* Say, Willes, 629.
(*u*) Topsall *v.* Ferrers, Hob. 175. See p. 21.
(*v*) Fryer *v.* Johnson, 2 Wils. 28.
(*w*) 6 Mod. 124; Bac. Abr. vol. ii. 571. See also p. 21, below

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Customary fees must not be excessive.

The case of Bryant *v.* Foot (*w*) shows that a fee will not be held a legal one if it is excessive. The case was as follows:—

From the year 1808 to 1854 the fee paid on the celebration of a marriage in a parish church was proved to have been almost uniformly 13*s.*, viz., 10*s.* to the rector and 3*s.* to the clerk. There was no evidence extending beyond 1808. The Court having power to draw inferences of fact: It was held by Kelly, C.B., Martin and Channell, BB., that, considering the difference of the value of money in 1189 and the present time, of which the Court will take judicial notice, it was impossible that a payment of 13*s.* on every marriage could have been made at that period, and that the objection of rankness, or excess, applied and rebutted the presumption, arising from uninterrupted modern usage, that the fee was taken as of right in the time of Richard I.

The same judges also expressed an opinion that a marriage fee must be a fixed fee, and cannot be of a varying amount; but that, if it were otherwise, the evidence would not support the claim to a merely reasonable or varying fee; and doubted whether the sum of 13*s.* on every marriage in a small country parish is a reasonable fee at the present day (*x*).

Bramwell, B., and Byles, J., thought that the fee was not a reasonable fee at the present time; that

(*w*) 3 L. R. Q. B. 497.

(*x*) It seems a claim may be made, in the case of a *toll*, to a reasonable sum which may vary in amount with the value of money. See Lawrence *v.* Hitch, 3 L. R. Q. B. 521.

it could not have been due as of right in the time of Richard I., and could have no immemorial legal existence.

It should be stated that Mr. Justice Keating dissented from this judgment, and considered that, as the fee claimed had been paid as far back as living memory went, and as a legal origin could be assigned to the payment, the presumption from this long-continued payment was (*y*) that it had an immemorial legal existence (unless rebutted by proof to the contrary), and that the large amount of the fee was not sufficient to rebut the presumption (*z*).

Fees to churchwarden, clerk, or sexton.

Fees, when payable, do not always belong to the minister. Sometimes they are payable to the minister,

(*y*) So also Sheppard *v.* Payne, 16 C. B. N. S. 132.

(*z*) It is not at all improbable that even as small a fee as 1*d.* is the ancient customary fee in some places and a much larger sum in others. In 1350 the daily wage of a master carpenter was fixed by the Statute of Labourers at 3*d.*, and that of his man at 1*d.* Warburton says that the lowest daily wage about this time was 3*d.*; beef and mutton were not more than a farthing a pound. In the reign of Edward III. the silver penny appears to have been worth 2$\frac{3}{4}$*d.* of our money; but if we make allowance for the difference in prices, according to Warburton's rough estimate, it was worth about 3*s.* 6*d.*; reckoning in the same way, 13*s.* then would have the purchasing power of nearly £10 now. See, however, Professor Thorold Rogers's work, which may be considered the best authority on the subject of prices from 1259 to 1400. See also Appendix II., p. 83, below. In Lawrence *v.* Hitch, 3 L. R. Q. B. 521, a toll of 1*s.* for every cartload of vegetables and fruit hawked about Cheltenham was held good. See in favour of a claim to a fee of reasonable amount varying with the value of money, *ib.* 534, and Sheppard *v.* Payne, *ubi sup.*

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sometimes to the churchwardens, sometimes a proportion is paid to each. It entirely depends on the custom (*a*).

The churchwardens, by custom, may have a fee for every burial within the church, by reason that the parish is at the charge of repairing the floor (*b*).

Where the clergyman is entitled to a fee for performing any office, the parish clerk or sexton is often also entitled to a fee for performing his part in the office or ceremony (*c*).

Vestry has no power to impose fees on parishioners for ordinary burial.

Lord Stowell thought that parishes had, with the consent of the ordinary, power to fix fees; and, sitting as Chancellor for the Diocese of London, settled and approved of a table of fees for St. Andrew's, Holborn (*d*). But Dr. Lushington held that the Ordinary or Chancellor had no power to create new fees for common burial of parishioners (*e*). It seems clear that Dr. Lushington's view was the correct one. Possibly a table of fees passed by the vestry, and sanctioned by the Chancellor, might be imposed on non-parishioners (*f*), or even on parishioners for special privileges.

In certain cases the Chancellor has now power to sanction fees (*g*), and under the Church Building

(*a*) Burn, tit "Burial," 9; Gilbert *v.* Buzzard, 3 Phill. Rep. 365; Littlewood *v.* Williams, 6 Taunt. 276. But see Gibson, 739.

(*b*) Phillimore, 841.

(*c*) *Ib.* 1607. See Ormerod *v.* Blackburn Board, 28 L. T. N. S. 438.

(*d*) Gilbert *v.* Buzzard, 3 Phil. Rep. 335, 367.

(*e*) Spry *v.* Guardians of Mary-le-bone, 2 Curteis, 5, 11.

(*f*) Cripps, 728.

(*g*) See p. 52, below.

Acts the vestry has power, in conjunction with other authorities, to fix fees (*h*).

There can be little doubt that, in earlier periods of our own history, the township had a considerable amount of legislative power, and could make bye-laws which would bind the inhabitants (*i*). It is not improbable that the vestries exercised like powers with regard to ecclesiastical affairs.

Where the burial fee should be paid.

According to the Canon Law, the burial fee or offering, or at least some part of it, should be paid where the deceased lived and received the Sacrament, although he were buried elsewhere (*j*). Bishop Gibson took the same view (*k*). But it seems that this would, in the case of a customary fee, be now held unreasonable (*l*).

It was held by Sir George Lee (*m*) that a claim by the vicar of a parish for a fee on the wedding of one of his parishioners in the Church of another parish was unreasonable and bad. And the learned Judge laid it down as a general principle that where no service is done no fee can be due (*n*). It was stated by one of the proctors that in a like case the Common Pleas held that such a custom was unreasonable, and granted a prohibition (*o*).

(*h*) See p. 50, below.

(*i*) Williams on Rights of Common, 47. Bac. Abr. tit. "Bye-laws."

(*j*) Ayl. Parerg. 133.

(*k*) Codex, p. 542. See Spelman's Concilia, 517, 545.

(*l*) See p. 17.

(*m*) Patten *v.* Castleman, 1 Lee, Ecc. Rep. 387. Blackstone, iii. 90. See above, pp. 10, 13.

(*n*) 1 Lee, Ecc. Rep. 397. Vaughan *v.* South Metropolitan Cemetery, 30 L. J. N. S. Ch. 265. But see p. 78.

(*o*) 1 Lee, 398.

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Who is a parishioner.

Every person dying within a parish has a right to be buried in the churchyard of that parish. This is an undoubted right by the custom of England (*p*). It has been suggested, though the legal right is admitted, that this is against the Canon Law principle; but it is submitted it is within the excellent rule laid down in Lyndwood (*q*), that a traveller is a parishioner of every parish withi which he comes.

Selvaggius, also, while stating that everyone should be buried in the place where he received the Sacraments, or in his own parish, though he die elsewhere, says that travellers are to be buried in the parish where they die if they cannot be buried in their own parish (*r*).

It would seem that a parishioner dying out of his parish has a right to be buried in the churchyard of his own parish. So in case of a family vault (*s*). This is in accordance with the Canon Law. Selvaggius states that a married woman should be buried with her husband, and if she has had more than one, with the last (*t*).

In Attorney-General *v.* Parker, Lord Hardwicke held that "Parishioner" was a very large word, and included not only inhabitants of the parish, but occupiers of lands that pay rates and duties, though

(*p*) Reg. *v.* Stewart, 12 A. & E. 773.
(*q*) iii. 16, p. 185, n.; see Ayl. Parerg., 134.
(*r*) ii. 118.
(*s*) Burn, tit. "Burial," 3. Cripps, 708. Phillimore, 845.
(*t*) Selvag. ii. 118.

they are not resident nor contribute to the ornaments of the Church (*u*). The like view was taken in a recent case (*v*).

Note.—It will be convenient to insert here an extract from a Constitution of Simon Mepham, A.D. 1328:—

"Because some sons of malediction have attempted to restrain the devotion of the people at solemnizations of marriages, purifications of women, offices of the dead (*mortuorum exequiis*), and upon other occasions (when the Lord Himself was wont to be publicly honoured in the persons of His ministers by the offering of oblations), to the offering of a penny, or some other mean sum, frequently applying the residue of the offering of the faithful to their own use, or to the use of others, as they pleased . . . we declare those who so offend shall be involved in the sentence of the greater excommunication." (Lyndwood, 185; Gibson, 739). Yet Lyndwood seems to refer at p. 187 to an accustomed offering of a penny, halfpenny, or farthing, on the above occasions. (Gibson, 738). Compare Canons cited, pp. 81, 82, below, and the offerings at Bicester, p. 83.

(*u*) 3 Atk. 577; see also Jeffrey's Case, 5 Rep. 66 b.

(*v*) Etherington *v.* Wilson, 1 Ch. D. 167.

CHAPTER VI.

BURIAL FEES IN SPECIAL CASES.

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Fees for consent.

It was held in the case of the Dean and Chapter of Exeter (*w*) that where a licence or consent to burial is necessary, the person giving such consent may ask his own price. This view was also taken in the case of burial of a non-parishioner; but some doubt was expressed by the Court (*x*). And where an incumbent refused to bury a parishioner beside his family, without an additional fee, the Court refused a Mandamus (*y*); so also where it was desired to bury in an iron coffin (*z*). Sir William Scott also held that the Ecclesiastical Court would support a claim by an incumbent for a fee for a monument, and would see that "their temporal interests were duly protected" (*a*).

Canon law.

The canon law prohibited the clergy from making any licence a means of extortion on the plea that the deceased was a non-parishioner (*b*), and forbid exorbitant demands generally.

(*w*) 1 Salk. 334; see above, p. 13.
(*x*) Nevill *v.* Bridger, 9 L. R. Ex. 214. See p. 40.
(*y*) E. P. Blackmore, 1 B. & Ad. 122.
(*z*) Gilbert *v.* Buzzard, 3 Phill. Rep. 337.
(*a*) Maidman *v.* Malpas, 1 Hag. Consist. 205; see p. 35.
(*b*) Selvag. ii. 121.

Sir John Nicholl disapproved of the principle of payment for consent, and complained that it was gaining ground (*c*). Bishop Gibson considered that the incumbent's authority with regard to burials in the Church arose, not merely from his having the freehold (*d*), but from his being the proper person to decide "the fitness or unfitness of this or that person to have the favour of being buried in the Church" (*e*).

Rights of incumbent and parishioners in the churchyard.

It will be convenient here to state shortly the rights of incumbent and parishioners in the churchyard.

According to the ecclesiastical authorities the churchyard by Consecration is "set apart for God's service" (*f*). The rector or vicar has the freehold; but though he has a certain beneficial interest, it is vested in him mainly as a trustee for the benefit of the parishioners for purposes of, or connected with, burial (*g*).

He has a right to the pasture, but must not put into the churchyard animals which will injure the bodies or graves, or put in swine, or turn the churchyard to any secular use (*h*).

Where there is a lay rector and a vicar the

(*c*) Rich *v.* Bushnell, 4 Hagg. Eccl. 173. See also opinion of the Archbishop of York, p. 44.

(*d*) Francis *v.* Ley, Cro. Jac. 367.

(*e*) Gibson, 543.

(*f*) Battiscombe *v.* Eve, 7 L. T. N. S. 697.

(*g*) Bardin *v.* Calcott, 1 Hagg. Consist. 14; Eccles. Comm. *v.* Kino, 14 Ch. D. 217. See p. 39.

(*h*) Cripps, 449; Keet *v.* Smith, 4 L. R. A & E. 413; Reg. *v.* Twiss, 4 L. R. Q. B. 407.

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pasture generally belongs to the vicar; but in the case of a perpetual curate (*i*) there is no presumption in his favour, each case depends on its circumstances (*j*).

According to most authorities where there is a lay rector and vicar the freehold of the churchyard is in the vicar (*k*). There is no doubt that the vicar has the right to possession (*l*).

In the case of new benefices constituted under the Church Building Acts (*m*) the freehold is in the incumbent (*n*). And by Lord Blandford's Act (*o*) in the case of new parishes constituted under the Peel Acts (*p*) the freehold is generally in the incumbent.

Fees for burial in a selected spot.

A parishioner has no absolute right to burial in any particular part of the churchyard, even in a vault built at his expense, without a faculty for himself and family, as will be seen from the following case (*q*):—

Ex parte Blackmore.

R. Blackmore, a parishioner of Stoke Damerel, had, in the year 1805, by the license of the church-

(*i*) Now in many cases styled Vicars, 31 & 32 Vict. c. 117.

(*j*) Lynd. iii. 28, p. 267; Greenslade *v.* Darby, 3 L. R. Q. B. 432; Nevill *v.* Bridger, 9 L. R. Ex. 214.

(*k*) Phillimore, 1756; Com. Dig. Cemetery (A. 2); Book of Church Law, 311, 312; Keet *v.* Smith, 4 L. R. A. & E. 398, and cases in above note. See, however, Addison on Torts, 402.

(*l*) Griffin *v.* Deighton, 33 L. J. N. S. Q. B. 181.

(*m*) See below, p. 49.

(*n*) 8 & 9 Vict. c. 70, s. 13.

(*o*) 19 & 20 Vict. c. 104, s. 10.

(*p*) See below, p. 51.

(*q*) E. P. Blackmore, 1 B. & Ad. 122. See p. 46, below.

warden and rector, caused a vault to be built at a considerable expense for himself and family in the churchyard of the parish, and the corpses of several members of his family had since been buried there. On the 22nd of November, 1829, a son of Mr. Blackmore having died, he applied to the Rev. Mr. St. Aubyn, the rector of Stoke Damerel, to allow the vault to be opened. The rector did not object to the vault as an inconvenient or improper place for the burial, but answered that he would not allow it to be opened until a fee of £2 12*s.* 6*d.* was paid; but he intimated that he would allow the corpse to be buried in the churchyard without the payment of any such fee. A suit was then instituted to compel the rector to allow it to be buried in the vault without the payment of such fee. That suit was not determined, and the corpse having remained unburied for many months, the Ecclesiastical Court had recommended to the parties that the fee required by the rector should be paid into court to abide the event of the suit, and that the burial in the vault should forthwith take place. To this proposition Mr. Blackmore had acceded, and tendered the amount of the fee, but the rector declined to bury the body in the vault on those terms. Chap. VI.

Bayley, J. "We cannot grant a mandamus to the rector to bury a corpse in a particular part of the churchyard. He has a right to exercise a discretion on that subject. If he had refused altogether to bury the corpse, we would have compelled him."

Littledale, J. "The clergyman is bound by law to

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bury the corpses of parishioners in the churchyard; but he is not bound to bury in any particular part of the churchyard. He and the churchwardens exercise a discretion on that subject; and if a rector is asked to do that which by law he is not bound to do, he may refuse, except upon certain conditions. Here Mr. Blackmore had no legal right to insist on burying the corpse in any particular part of the churchyard. We cannot, therefore, compel the rector to bury the corpse in the vault." Parke, J., concurred, and the rule was refused.

It should be noticed that the vault was built without a faculty, and also that the application was to the Civil Court for a Mandamus.

If an extortionate fee were demanded it is not impossible that an application to the Spiritual Court would be successful. See also opinion of Archbishop of York, pages 45, 46, below.

Claim by prescription or faculty.

In particular cases there may be a rightful claim by prescription to be buried in a particular vault as belonging to an ancient house (*r*).

This may be so, even in the chancel (*s*).

Or a claim may be made by virtue of a faculty to a family vault or grave.

A right to bury in a particular vault is a sort of easement (*t*).

Vaults require a faculty.

A faculty is necessary before a vault can be allotted either to a parishioner or non-parishioner.

(*r*) Cripps, 711 ; compare Crisp *v.* Martin, 2 P. D. 15.
(*s*) Waring *v.* Griffiths, 1 Burr. 440.
(*t*) Bryan *v.* Whistler, 8 B. & C. 288 ; 2 Man. & Ry. 318.

This rule seems naturally to arise partly from the jurisdiction of the Ecclesiastical Court over churches and churchyards, and partly from the fact that the church and churchyard are held for the benefit of the parishioners generally, and that no space, beyond the ordinary space for burial, ought to be granted to any individual or family without the consent of the Ecclesiastical Court, where any parishioner can appear and state grounds of objection. The resemblance between faculties for pews and those for vaults will be noticed.

Sir Robert Phillimore quotes the following opinion of Dr. Harris (*u*):—

"Neither do I apprehend that the friend or representative of any parishioner can have a right to claim, on the part of the deceased, more ground than may be sufficient for his burial, for the usual and ordinary allowance; and that if a larger portion of ground should be expected, an application ought to be made to the minister and the churchwardens; and that if a vault should be wanted by the friends of a deceased person, whether foreigner or parishioner, an application ought to be made to the Bishop's Court for a faculty, which is never granted without decreeing and causing public notice to be given to the parishioners of what is intended to be done."

Consent of the minister usually required.

It is not usual to grant a faculty for a vault without the consent of the minister, although the Court is not obliged to have his consent. And, according to most authorities, the incumbent may

(*u*) Phillimore, 844.

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make what reasonable charge he likes for his consent to the application.

A faculty for a vault ought not to be granted, even if unopposed, if there is a want of burial room.

Grant of vault by incumbent.

A grant of a vault by an incumbent without a faculty would seem to be invalid. Any succeeding incumbent, and perhaps even the incumbent who made the sale, might, in the exercise of his discretion, bury persons in it other than those for whom it was granted (*v*).

Bryan *v.* Whistler.

In the case of Bryan *v.* Whistler (*w*) the plaintiff being desirous of burying a deceased person in the church of which the plaintiff was rector, applied to him for leave to make a vault and put up a tablet. The rector, by parol, granted leave but demanded a fee of £20, which was paid. The vault was made at the plaintiff's expense, and the defendant performed the service over the body of the person who was buried in the vault, to the size of which the defendant made no objection at that time. The defendant gave the following receipt to the plaintiff: "Received . . . £20 for permission to make a vault in the church . . . and to put up a tablet or monument . . . and one guinea for the service, etc."

The plaintiff put up a tablet stating that the vault was appropriated to his family.

This was frequently seen by the defendant,

(*v*) Cripps, 453; Bryan *v.* Whistler, 8 B. & C. 288.
(*w*) 8 B. & C. 288; 2 Man & Ry. 318.

who made no objection to it. In 1825 the defendant, without the plaintiff's leave, opened the vault and buried another corpse there.

The plaintiff brought an action, stating in his declaration that "the sole and exclusive use" of the vault had been granted to him.

It was held that no action could be maintained against the rector, for even if he had the power to grant the exclusive use of the vault it would require a deed. Bayley, J., expressed an opinion that a deed would have been ineffectual, and that the rector had no power to grant any privilege, except for the particular burial then about to take place. He said: "The rector has the freehold of the church for public purposes, not for his own emolument; to supply places for burial from time to time as the necessities of his parish require, and not to grant away vaults, which, as it seems to me, cannot be done unless a faculty has been obtained." The learned Judge compared the grant of a vault to that of a pew. Littledale, J., added that he had little difficulty in saying the rector had no power to grant sole and exclusive right of burial.

Churchyard cannot be sold.

Neither the Ecclesiastical Court nor any person whatever has power to *sell* any part of the churchyard for graves or vaults.

The utmost that can be done is to grant the perpetual and exclusive right of burial, and this, it seems, requires a faculty. But by Act of Parliament in some chuchyards vaults and burial places may be "sold" (*x*).

(*x*) 5 Geo. IV. c. 103, s. 15. See also p. 45.

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Vaults and tablets in chancel.

In Rich *v.* Bushnell (*y*) it was held that a lay rector is not entitled to make a vault or fix tablets in the chancel without a faculty.

The vicar has a right to be heard on the application for the faculty, but his consent is not necessary.

The Judge, Sir John Nicholl, expressed grave doubts whether the vicar could demand a fee for the construction of a vault or affixing of a tablet in the church except by special custom. He disapproved of the principle of payment for consent (*z*).

Form of faculty for vault.

In Magnay *v.* Rector, etc., of St. Michael and St. Martin (*a*), the Court granted an application for a faculty "for interment of the bodies of C. Magnay and of his family exclusively of all others for ever;" but added the limitation "to the use of the family so long as they continue parishioners and inhabitants."

The Court observed, that in the case before them, there was sufficient burial room in the parish to allow of this appropriation.

Monuments in strictness require the consent of the Ordinary.

Strictly speaking, the consent of the Ordinary by faculty is necessary for the erection of a monument either within or outside the church; and the Court before granting a faculty for such a purpose usually requires the consent of the incumbent.

But in practice in all ordinary cases a faculty for a tombstone in the churchyard is not really required, and the incumbent's consent is practically sufficient.

(*y*) 4 Hagg. Eccl. 164.
(*z*) *Ib.* 173. See above, p. 24.
(*a*) 1 Hagg. Eccl. 48.

Lord Coke says it is lawful to erect monuments, and expresses warm approval of their erection if it is not to the hinderance of divine service (*b*).

The rule is thus laid down by Burn (*c*):—

Whether incumbent can demand a fee for erection of gravestone or monument.

"Whether a fee is due to the incumbent for erecting a gravestone or monument in the churchyard hath been questioned by some; and no case hath occurred wherein the same hath received a judicial determination.

"It seemeth to be an argument in favour of the incumbent that although it is necessary to bury the dead, yet it is not necessary to erect monuments; and after the soil hath been broken for interring the dead, the grass will grow again, and continue beneficial to the incumbent; but after the erection of a monument there ceaseth to be any further produce of the soil in that place. And if the incumbent's leave is necessary for the erecting a monument, it seemeth that he may prescribe his own reasonable terms; or if an accustomed fee hath been paid, that such custom ought to be observed."

Sir Robert Phillimore takes the same view (*d*).

Bardin *v.* Calcott

The law as to erection of monuments and tombstones is laid down by Sir W. Scott, in Bardin *v.* Calcott (*e*), as follows:—

"The churchyard, as well as the church, is the freehold of the minister, subject to the right of the parishioners for interment. Ancient custom

(*b*) 3 Inst. 202.
(*c*) Tit. "Burial," 12.
(*d*) Phillimore, 882.
(*e*) 1 Hag. Consist. 14.

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often annexes fees for erecting a stone or anything else by which the grave may be protected and the memory of the person interred preserved. It is no general common law right; but custom will interpose, and where it is shown to be customary such practice will be supported. As to buildings of height, the authority is reserved to the Ordinary, and permission ought not to be granted without his authority in some manner interposed. The proper mode, strictly speaking, is to apply to the Ordinary for a faculty, who calls on all persons having a right to show cause why it should not be done, and hears and determines on the force of any objections which may be made against it (*f*). The third Institute leaves the matter at large (*g*); but all commentators say that the Ordinary is to judge of the convenience of allowing tombs or monuments to be erected, and that if done without his consent he has sufficient authority to decree a removal."

Custom in Ecclesiastical Court.

It should be remembered that in the Ecclesiastical Court a custom is considered "ancient" if it has existed forty years (*h*).

It was stated by Holt, C.J., that in some cases even usage for ten years would make a custom in the Spiritual Court (*i*). See Spry *v.* Gallop, cited above at p. 13.

(*f*) See p. 29.

(*g*) 3 Coke Inst. 202.

(*h*) Patten *v.* Castleman, 1 Lee, Eccl. Rep. 394; see 1 P. W. 657; 1 Str. 421.

(*i*) Lord Raymond, 435.

Removal of monument by Ordinary.

The Ordinary may order a monument to be removed if inconveniently placed in a church; but if the Ordinary does not interfere the consent of the incumbent is sufficient (*j*).

Flat gravestones.

It is not usual to apply for a faculty for a mere flat gravestone (*k*).

Maidman *v.* Malpas.

In the case of Maidman *v.* Malpas (*l*), where the defendant had, without faculty, erected a monument in the chancel, and refused to pay the demand of the rector for a fee of £30, Sir William Scott delivered judgment as follows:—

"All parishioners have a right to be buried in the churchyard without leave of the incumbent; but the permission of the Ordinary is necessary before any monument can properly be erected. It is to his care that the fabric of the church is committed, that it shall not be injured or deformed by the caprice of individuals. The consent of the incumbent is taken on such occasions; and especially of the rector for monuments in the chancel. A faculty is likewise required, though it is frequently omitted, under the confidence reposed in the minister, and the Ecclesiastical Court is not eager to interpose, but when the case is brought before it it is necessary to inquire whether the thing is proper to be done and whether the consent of the incumbent has been obtained. Something

(*j*) Hopper *v.* Davis, 1 Lee, Ecc. Rep. 640.

(*k*) Sharpe *v.* Sangster, 3 Hag. Eccl. 337; see also Bardin *v.* Calcott, 1 Hag. Consist. 18.

(*l*) 1 Hag. Consist. 205.

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has been said in argument of the extortion of money; but I am not prepared to say that the demand of a usual fee is to be called extortion. I conceive a clergyman may legally demand and accept a fee for his consent; nor is it an improper thing that the Ecclesiastical Court should see that this is done, and that all temporal interests are duly protected."

The vicar has no right, strictly speaking, to fees for erection of monumental tablets, or construction of vaults in the chancel (*m*).

Repairs.

Before any persons enter upon a churchyard to repair monuments it is proper to ask the leave of the churchwardens, and the churchwardens, so far as their authority extends, are bound to grant leave. It is rather their duty to encourage than to obstruct repairs (*n*).

Appeal to Ordinary.

If the incumbent objects to the erection of, or inscription on, a monument or tombstone, there is an appeal to the Ordinary, who can override any objection of the incumbent.

Inscriptions.

It seems that no person has a right to erect a tombstone with an inscription impugning the doctrine of the Church of England, and the stone may be removed.

In Breeks *v.* Woolfrey (*o*) the inscription "Pray for the soul of J. Woolfrey" was held by Sir H. Jenner (afterwards Sir H. Jenner Fust) not illegal.

(*m*) Rugg *v.* Kingsmill, 3 L. R. P. C. 65.
(*n*) Bardin *v.* Calcott, 1 Hag. Consist. 16.
(*o*) 1 Curt. Eccl. Rep. 880.

In Keet *v.* Smith (*p*) the incumbent refused to allow a stone with an inscription describing the deceased as daughter of the "Rev. H. K., Wesleyan Minister." The incumbent objected to the term "Reverend" as applied to a Wesleyan minister. The Chancellor of the Diocese of Lincoln and the Dean of Arches, Sir R. Phillimore, took the same view, and the latter in course of his judgment said (*q*):—

"The law as to the rights of the incumbent and parishioners with respect to gravestones in churchyards is often but partially understood and carelessly stated. I will endeavour to lay it down correctly. The churchyard is the freehold of the incumbent, subject to the right of the parishioner, or stranger happening to die in the parish, to simple interment, but to no more. Indeed, the incumbent has the right to pasture animals which do not injure the bodies interred in the churchyard, and every gravestone, of course, interferes with that pasturage.

"The incumbent, for this as well as for other more important reasons, has a *primâ facie* right to prohibit altogether the placing of any gravestone, or to permit it upon proper conditions, such as those which relate to the size and character of the stone, the legality or propriety of the inscription upon it, on the payment of a proper fee. Usage, indeed, has much favoured the placing of such stones, and as a general rule the incumbent permits them; while the exercise of his right of refusal has

(*p*) 4 L. R. A. & E. 398.
(*q*) *Ibid.* 413.

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become, or perhaps always was, subject to the control of the Ordinary. . . . . In the important case of Breeks *v.* Woolfrey (*r*), he (Sir H. Jenner Fust) drew a clear distinction between the general right of the incumbent to refuse permission to place a gravestone, and his right to refuse such permission on the ground that the inscription upon it was contrary to law; and while upon the latter special ground he overruled the refusal of the incumbent, he was careful to allow no interference with the right of the incumbent to refuse according to the general law his consent."

On appeal to the Judicial Committee of the Privy Council the decision of the learned Dean of Arches was reversed (*s*) on the ground that the only objection made was to the term "Reverend" in the inscription, and that this term was not a title of honour exclusively possessed by the clergy of the Church of England. The Lord Chancellor said:—'How far Mr. Smith (the Vicar) might have objected to any tombstone being erected, or how far he might have objected to the tombstone in question being erected upon the ground that in size or composition it was unsuitable for the place where it was proposed to be erected, it is unnecessary for their lordships to consider, because no objection upon any of those grounds has been made by the vicar."

(*r*) 1 Curt. 880.
(*s*) 1 P. D. 73.

CHAPTER VII.

FEES FOR BURIAL OF NON-PARISHIONERS.

Consent of incumbent and parishioners necessary.

For the burial of non-parishioners the consent of the incumbent and of the parishioners, or their representatives the churchwardens, is necessary (*t*).

The following opinion of Dr. Harris is quoted by Sir R. Phillimore (*u*):—

"I apprehend the churchyard of a parish belongs in different ways both to the minister and the churchwardens; for I take the soil or surface to belong in general to the minister, and the interior part to the parishioners for burial (*v*); and consequently I think that no foreigner or outdweller ought to be buried in the churchyard of the parish mentioned in this case (unless when a traveller or accidental comer happens to die there), without the consent both of the minister and the churchwardens."

Fee may be charged.

It would seem from the cases of Littlewood *v.* Williams (*w*) and Nevill *v.* Bridger (*x*) that both minister and churchwardens may ask a heavy fee before giving consent to burial of non-parishioners.

(*t*) Burn, i. 258; Littlewood *v.* Williams, 6 Taunt. 282.
(*u*) Phillimore, 844.
(*v*) See above, p. 25.
(*w*) 6 Taunt. 277.
(*x*) 9 L. R. Ex. 214.

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In the former case Gibbs, C.J., held that a practice which had prevailed for many years in the parish of Hendon that on the burial of a non-parishioner a sum of money should be paid, one moiety to the vicar and the other to the churchwardens for the poor, was lawful.

He said if it could be shown that parishioners sustained actual inconvenience from the burial of strangers it might be different, but if there was not that circumstance the churchwardens had a discretion, and that if out-parishioners chose to be buried there, and to pay for it, no law prevented them.

Nevill *v.* Bridger.

In Nevill *v.* Bridger it was proved in the County Court that in 1852 Henry Davies, husband of the deceased, was buried in a brick grave in the aisle of Wraysbury Church, belonging to the family of Mrs. Davies. He was not a parishioner, and his friends paid the vicar £21, such sum being the amount charged in Wraysbury for the burial of non-parishioners. On the 24th of January, 1868, Mrs. Davies died. She was not a parishioner at the time of her death. By her will she left directions that she was to be buried in Wraysbury Church near her husband. The defendant accordingly authorised an undertaker to make the necessary arrangements and do all that was requisite for that purpose. The undertaker communicated with the authorities on the spot, and applied for permission to open the vault, and to bury Mrs. Davies there. On being informed that the fees would be high, he stated that he had conducted Mr. Davies' funeral in 1852, and had paid the charges made in respect thereof.

The necessary consent was then given, the brick grave was opened, and Mrs. Davies interred therein. The defendant was present at the funeral.

The parish clerk, who had lived in the parish fifty years, and succeeded his father in office in 1845, produced an old book from the iron chest in the parish church containing, among other things, in the handwriting of the deceased vicar, a scale of fees. These he stated to have been in force as long as he could remember. According to this scale the charge for opening a vault in the Church for the burial of a non-parishioner was twenty guineas.

Soon after the funeral this sum was demanded of the undertaker and a cheque promised. The defendant, however, upon the matter being brought to his notice, demurred to the charge as excessive, and declined to pay it.

The County Court Judge found that the sum claimed was a reasonable one, and was that customarily charged by, and paid to, the vicars of Wraysbury for their consent to the burial of non-parishioners within the parish church, and for leave to open the soil for that purpose, and that the defendant had by his authorised agent agreed to pay such reasonable amount as should be required, and gave judgment for the plaintiff for £21. From this judgment the defendant appealed.

Judgment was given by Bramwell, B., as follows:—

"The Judge found, as a matter of fact, that the defendant had agreed to pay a reasonable fee, and

Chap. VII. that £21 was a reasonable fee. Even if his conclusion were wrong, we should not interfere with it unless it were shown that there was no evidence to justify it. But we think that he was right upon this point also. Thirdly, the question was raised whether such a bargain as was made here was capable of being enforced, and it was contended that, although the plaintiff is the freeholder of the church and churchyard, and consequently with him rests the power of refusing to allow any interference with the soil, yet that he is to exercise that power solely with regard to the fitness of the person whom it is proposed to bury, and must not make the payment of money a condition of his assent. It was said that this fee was in truth a burial fee, and not due therefore except by immemorial custom, and that an express contract to pay such a fee was void. Some of the authorities certainly countenance this view, and especially the passage cited by Mr. Bayford from Gibson's Codex (2nd ed., p. 453) (*y*). But the current of authorities is the other way. Thus we have the authority of Sir William Scott in Maidman *v.* Malpas (*z*), the case of Palmer *v.* Bishop of Exeter (*a*), the opinion of Abney, J., in Andrews *v.* Cawthorne (*b*), and that of Littledale, J., in *Ex parte*

(*y*) 1st edit. 543.
(*z*) 1 Hagg. Consist. 205. See p. 35.
(*a*) 1 Str. 576.
(*b*) Willes, 538n.

Blackmore (*c*), and the text writers upon the subject treat these cases as decisive. Chap. VII.

"It may be that on some occasion these authorities may be successfully questioned. But, in the present case, there is no appeal from our decision, and we should not, even assuming we disapproved of them, which I am far from saying that we do, be justified in running counter to them. Our judgment will therefore be for the plaintiff."

Piggott, B., concurred.

Injunction to restrain incumbent from interring non-parishioners.

The Court of Chancery in 1868 issued an injunction (on the usual undertaking as to damages) to restrain, until the hearing, an incumbent from interring in the churchyard the corpse of any person except parishioners and persons dying within the parish. The order was not to extend to interments in graves already purchased. This injunction was afterwards made perpetual by consent (*d*).

As the following opinion of the Archbishop of York, lately published by him, chiefly relates to the burial of non-parishioners it is inserted in this place:—

Sheffield Burial Grounds Dispute.

Opinion of the Archbishop of York.

A dispute having arisen as to the fees payable for burials in certain churchyards in Sheffield, and several persons having combined to resist the payment of fees which they think variable and excessive, the matter has been referred to the Archbishop, to advise thereupon.

It is needless to say that the Archbishop has no power to adjudicate a disputed claim to a fee. If a fee has been

(*c*) 1 B. & Ad. 122. See p. 26.

(*d*) Atty.-Gen. *v.* Strong, Seton i. 197.

Chap. VII. demanded, and has been refused on the ground that it is not a customary fee, or one not sanctioned by law, this is a matter triable in the courts, and to them the matter would have to be brought. The Archbishop cannot take personal cognizance of such cases. This will relieve him from the duty of following the details of some cases which have been brought before him. These past cases may be used for the purpose of illustration and of suggestion for the future.

The parishes principally involved in this dispute are Fulwood, Wadsley, Brightside, St. Thomas, Heeley, and Ecclesall; and the subject of the dispute is mainly, but not entirely, the burial of non-parishioners.

1. The case of Wadsley appears to raise almost all the questions that are under discussion. It appears that on December 17th, 1877, the Incumbent of Wadsley (the Rev. M. Holmes) published a table of fees, intended to be supplementary to a certain table of fees of the rural deanery of Sheffield; which appears to have been in use for many years past. The new table purports to be signed, "For self and churchwardens, M. Holmes, vicar." It contains three clauses, applicable entirely to non-parishioners. The first clause provides that no funeral can be taken unless a grave is purchased. The second provides that the ordinary fee of 9*s.* 6*d.* is to be doubled, and an extra fee for the clergyman of 10*s.* 6*d.* added. The third provides that the clergyman shall have 5*s.* additional for each foot of depth beyond seven feet. This table calls for several observations. In the first place it must be taken that the incumbent accepts the whole responsibility; for it is not signed by the churchwardens, nor is their assent to it distinctly alleged; not that their assent would make it valid, though it seems that churchwardens can object to the ground of the parish being occupied by strangers. It has never been submitted to the Chancellor of the Diocese nor to the Archbishop. It therefore raises the question whether a clergyman can of himself increase the customary or authorised fee by a supplementary table on his own authority. And the answer given to this question by competent legal authority is that an incumbent has no such power (*e*). On

(*e*) See pp. 12, 39.

the same authority it must be remarked that there is no power to sell part of the churchyard to a non-parishioner under any circumstances; nor indeed to a parishioner (*f*). As the incumbent for the time being can refuse to inter a non-parishioner, the sale of land by one incumbent has no validity to bind the next, or even the vendor himself; and, consequently, the alleged purchase really conveys nothing (*g*). Some light is thrown on this by a case at Brightside, in which it is alleged that on a non-parishioner applying to have a grave which he had purchased opened for an interment, he was answered that it should not be opened until certain disputed arrears of fees had been paid, and the result was that the interment took place elsewhere. Such a refusal to inter until past claims were satisfied would have been absolutely illegal in the case of a parishioner, and would have subjected the clergyman to serious consequences (*h*). But in the case of a non-parishioner the clergyman, being not obliged to inter any but parishioners, was able to deprive the person of the user of the very ground which he had purchased, and without redress. The second and third provisions in the Wadsley regulations have for their purpose only the increase of the clergyman's fees. Apparently before the issue of the supplementary regulations, the ordinary fee of 9*s.* 6*d.* for a burial would have been doubled in the case of a non-parishioner. But under the new regulation, in the case of a grave twelve feet deep (which it seems is not an unusual depth, owing to the wish to make as much use as possible of the purchased ground), the account would stand as follows :—

Double fees	£0	19	0
Additional to clergyman	0	10	6
Do. 5 feet, at 5*s.* per foot	1	5	0
	£2	14	6

Thus the fee is raised by this supplementary table from 19*s.* to £2 14*s.* 6*d.* It may be laid down as a certain proposition of law that the clergyman has no power to issue this kind of

(*f*) See p. 31.
(*g*) See p. 30.
(*h*) See Canon 68, and Escott *v.* Mastin, 4 Moore, P. C. C. 104.

Chap. VII. table of fees. Nor is it easy to understand the basis upon which these regulations have been framed. No reason exists for charging a higher fee for reading the service at a deep grave than would be charged at a shallow one. Whilst the charge of double fees for non-parishioners has a kind of custom to sanction it, no sanction can well be pleaded for first doubling the fee, and then adding the arbitrary sum of 10*s.* 6*d.*, which rather more than trebles the original fee. It is therefore necessary to declare that the said supplementary table of fees has no legal force, and ought not to be any longer acted upon.

2. In the case of the parish of Fulwood it is alleged that the table of fees which has governed the rural deanery of Sheffield for some years past has not been departed from. This table, however, certainly seems to require a careful revision on the following points:—It seems to divide interments into those which are and those which are not in a "selected situation" (*h*). In the former double fees are charged. It assumes that mural tablets may be placed within the church at a given rate, without any other sanction than that of the incumbent.

The parish of Ranmoor has been recently formed, partly out of the parish of Fulwood. Ranmoor has no churchyard, and it is alleged that the parishioners of Ranmoor, who were parishioners of Fulwood, have their rights of interment in the churchyard of the mother church preserved to them by 7 & 8 Geo. IV. c. 72, s. 2 (*i*). At present double fees are charged in the case of such parishioners. The Archbishop must decide that the exaction of double fees from them as if they were not parishioners is at variance with this Act, and cannot be sustained.

3. Persons who are dissatisfied with the existing state of things have assumed the power to determine what amount of fees ought to be paid, and have taken upon themselves to adopt in some cases the old fee of the parish of Ecclesfield, which amounts to one penny (*j*). There is no reason why such a fee should apply in any other parish than that in

(*h*) See p. 26.
(*i*) See p. 57.
(*j*) See pp. 19, 23.

which it originally prevailed. Nor does the fact that any of the parishes now under consideration were severed from Ecclesfield establish such a custom in a new churchyard belonging to such parish. It is said that in providing a new churchyard in Ecclesfield itself the old fee has been departed from.

4. The question has been raised, whether a clergyman could charge a fee for the burial of an unbaptised infant without any service. No question is raised as to the sexton's fee in such a case. The answer is, that unless an ancient custom can be alleged, which is unlikely, such a claim would not be recognised by the courts of law (*k*).

5. It is evident from these remarks that the whole subject of the fees requires a careful re-consideration. The prevalence of burials of non-parishioners in and about Sheffield, apparently with the general consent of the parishioners themselves, seems to make it desirable that the fees chargeable for such interments should be fixed by authority, and that they should be invariable and fully known. They should be fixed with due reference to the prevailing customs of the neighbourhood in similar cases, and to the fact that a very large portion of the income of some poorly endowed parishes arises from these fees. Under these circumstances it would be desirable that a table of fees for each parish, but, as far as possible, adjusted upon one scale, should be prepared by the clergy and churchwardens of each parish, and submitted to the Chancellor of the diocese to be approved by him (*l*). As the present state of things is extremely painful, and has produced unseemly conflicts at the very grave side, it is highly desirable that no time should be lost.

6. The Archbishop earnestly desires to appeal to the good feeling of those who have banded themselves together for the agitation of this question to abstain from everything which may make the churchyard a scene of unseemly riot and confusion, and to test the rights of non-parishioners and others by methods which are quieter and more conclusive in their results.

(*k*) See pp. 12, 71.
(*l*) See pp. 20, 52.

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It may be as well to add that no proposition of law has been laid down in this paper except under the best legal advice that could be procured.

Sept. 22, 1880. W. EBOR.

CHAPTER VIII.

FEES CLAIMED UNDER ACTS OF PARLIAMENT.

Parishes divided under the Church Building Acts.

SINCE 1818 a large number of statutes, known as the Church Building Acts (*m*), have been passed to extend the usefulness of the Church of England by facilitating the building of churches and the sub-division of parishes.

Under 58 Geo. III. c. 45, the commissioners, with certain consents, may constitute "distinct and separate parishes for all *ecclesiastical* purposes whatever" (*n*). The early Church Building Acts also gave power to divide a parish in other ways, in cases where it was not deemed expedient to divide it into "separate and distinct" parishes (*o*).

Thus the commissioners might also divide a parish into *ecclesiastical* districts, where they thought such a course preferable (*p*). These ecclesiastical districts become after certain events "*district* parishes."

The Church Building Acts also give power to divide parishes into district chapelries, and empower the creation of consolidated chapelries, and the support of chapels without districts (*q*).

(*m*) For a list, see Stephen's Commentaries, ii. 749.
(*n*) s. 16. See p. 52, note (*u*).
(*o*) Phillimore, 2168.
(*p*) s. 21.
(*q*) Phillimore, 2168.

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By 58 Geo. III. c. 45, s. 27, it was enacted: "That all Acts of Parliament, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to such separate and distinct parishes and district parishes so made as aforesaid, when they shall so become complete, separate, and distinct parishes or district parishes, under the provisions of this Act, after the death, resignation, or other avoidance of the existing incumbents, respectively, in each such parish or extra parochial place, and to the churches and chapels thereof, and to the ecclesiastical persons having care of souls, or serving the same, in like manner in every respect as if the same respectively had been ancient, separate, and distinct parishes and parish churches by law, to all intents and purposes."

A table of fees may be fixed.

But by 59 Geo. III. c. 134, s. 11, a table of fees may be fixed:—

"It shall be lawful for the said commissioners and they are hereby empowered to make and fix any table of fees for any parish, with the consent of the vestry or select vestry, or persons exercising the powers of vestry in such parish, and also to make and fix any such table of fees for any extra parochial place, or in or for any district chapelry or parochial chapelry, in which any church or chapel shall be built or appropriated, under the provisions of the said recited Act or this Act, with the consent, nevertheless, in all such cases, of the bishop of the diocese; and all fees so fixed may be demanded,

received, sued for, prosecuted, and recovered by the spiritual person or clerk or sexton to whom the same shall be assigned, in like manner and by such and the same means as any ancient legal fees of a like nature may be sued for, prosecuted, and recovered."

The "Commissioners" were the Church Commissioners, now the Ecclesiastical Commissioners.

It will be noticed that, to make a valid table of fees under this Act, there must in some cases be agreement of bishop and commissioners (*r*) and vestry, and in all cases the agreement of the commissioners and bishop.

Mr. Dale expresses an opinion that the powers given by this Act apply to all parishes (*s*).

Parishes divided under 5 Geo. IV. c. 103, and 1 & 2 Will IV. c. 38.

Parishes may also be divided under 5 Geo. IV. c. 103 and 1 & 2 William IV. c. 38. Section 14 of the last mentioned Act makes provision as to fees in certain cases.

Parishes divided under the New Parishes Acts.

Other provisions for the subdivision of parishes are made by "The New Parishes Act, 1843," "The New Parishes Act, 1844," and "The New Parishes Act, 1856" (*t*).

The two former are known as "The Peel Acts" and the last as "Lord Blandford's Act."

By the Act of 1843 "districts" may be con-

(*r*) As to this Act see King *v.* Alston, 18 L. J. N. S. Q. B. 59; 12 Q. B. (A. & E.) 971.

(*s*) Dale, 105. So also the Bishop of Salisbury. See *Guardian*, Oct. 20, 1880, p. 1426.

(*t*) 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94; 19 & 20 Vict. c. 104.

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stituted for "*spiritual* purposes" (*u*). The bishop may licence a temporary place of worship, and the minister of such "district" may, under the bishop's licence, "perform" churchings and receive fees for such churchings fixed by the chancellor of the diocese (*v*).

This constitution of a "district" is not to prevent marriages and burials in the mother church "until a church or chapel shall have been built or acquired within such district and shall have been approved and consecrated as hereinafter (*w*) provided."

A table of fees may be fixed.

But by section 15 when a church or chapel has been approved by the commissioners and consecrated, the "district" becomes a "new parish." In such parish the chancellor of the diocese has power to fix fees for marriages, churchings, and burials, but not for baptisms or registration thereof.

It would seem that fees are to be recovered like ancient customary fees. It will be convenient to set out this section:—

"And be it enacted, that when any church or chapel shall be built, purchased, or acquired in any district, constituted as aforesaid, and shall have been approved by the said commissioners, by an instrument in writing under their common seal, and consecrated as the church or chapel of such district, for the use and service of the minister and inhabitants thereof, such district shall, from and after the consecration of such church or chapel, be and be deemed to be a new parish for ecclesiastical purposes, and shall be known as such by the name of 'The new parish of ;' instead of 'The

(*u*) s. 9. Not for all ecclesiastical purposes.
(*v*) ss. 13, 15.
(*w*) *i.e.*, by s. 15.

district of ,' according to the name so as aforesaid fixed for such district; and such church or chapel shall become and be the church of such new parish accordingly, and any licence granted by the bishop, licensing any building for divine worship as aforesaid, shall thereupon become void; and it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages, baptisms, churchings, and burials, and to require and receive such fees upon the solemnization of such offices or any of them as shall be fixed by the chancellor of the diocese in which such new parish shall be situate, and which fees, and also the fees for churchings to be received as aforesaid by the minister of such district, such chancellor is hereby empowered and required to fix accordingly; and the like Easter offerings and dues may be received within the limits of such new parish by the perpetual curate thereof as are and were, at and before the time of the passing of this Act, payable to the incumbent of the church of the principal parish of which such new parish originally formed a part; and the several laws, statutes, and customs in force relating to the publication of banns of matrimony, and to the performance of marriages, baptisms, churchings, and burials, and the registering thereof respectively, and to the suing for and recovering of fees, oblations, or offerings in respect thereof, shall apply to the church of such new parish; and to the perpetual curate thereof for the time being: Provided always, that it shall not be lawful for any such minister or perpetual curate to receive any fee for the performance of any baptism, within his district or new parish, as the case may be, or for the registration thereof."

Complicated modes of division of parishes.

It will be seen from the above incomplete sketch that the modes in which parishes have been divided are numerous, and extremely complicated. For a complete explanation the reader is referred to Phillimore's "Ecclesiastical Law," p. 2167, or to Dale's "Clergyman's Legal Handbook," 5th edit., p. 25.

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Sir Robert Phillimore states (*x*) that an attempt has been made to bring the various divisions of parishes into one system by the following sections of Lord Blandford's Act (*y*):—

By section 14:—"Wheresoever, or as soon as banns of matrimony and the solemnization of marriages, churchings, and baptisms according to the laws and canons in force in this realm are authorised to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the fifteenth section of the first recited Act (*z*), and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the said firstly and secondly recited Acts (as amended by this Act) relative to new parishes, upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the said last mentioned Acts."

And by section 15 "the incumbent of every new parish created or hereafter to be created pursuant to the provisions of the said firstly and secondly recited Acts [the Peel Acts] or of this Act, shall, saving the rights of the bishop of the diocese, have sole and exclusive cure of souls and the exclusive right of performing all ecclesiastical offices within the limits of the same, for the resident inhabitants therein, who shall for all ecclesiastical purposes be parishioners thereof, and of no other parish, and such new parish shall, for the like purposes, have and possess all and the same rights and privileges, and be affected with such and the same liabilities as are incident

(*x*) Phillimore, 2176.
(*y*) 19 & 20 Vict. c. 104, ss. 14, 15.
(*z*) 6 & 7 Vict. c. 37.

or belong to a distinct and separate parish, and to no other liabilities: Provided always, that nothing herein contained shall be taken to affect the legal liabilities of any parish regulated by a local Act of Parliament, or the security for any loan of money legally borrowed under any Act of Parliament or otherwise."

CHAPTER IX.

FEES IN DIVIDED PARISHES.

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Separation only for ecclesiastical purposes.

THE Acts for subdivision of parishes are extremely complicated, but it seems clear that, in general, the separation of the newly-formed from the mother parish is only for all ecclesiastical purposes. Thus it was decided that though a district of an old parish, appropriated to a new church under 58 Geo. III. c. 45, 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, becomes a separate parish for all ecclesiastical purposes; yet, as it remains part of the old parish as to poor and other parochial rates, the inhabitants of the district have a right to vote in vestry in the election of churchwardens for the old parish (*z*).

Burial.

The right to the burial service is exclusively ecclesiastical; that to interment is, however, recognised by the civil courts, and enforced by Mandamus (*a*).

If the inhabitants of any newly formed district have by any means lost their right of interment in the churchyard of the old church they will be liable to pay the same fees as non-parishioners, even if they are admitted to bury there at all.

In a case relating to the appointment of a burial

(*z*) Reg. *v.* Stevens, 32 L. J. N. S. Q. B. 90; Roxburghe (Duke of) *v.* Millar, 3 App. Cas. 14.

(*a*) Rex *v.* Coleridge, 2 B. & Ald. 806.

board, the Lord Chief Justice Cockburn said: "I never heard that a parishioner was denied his right to the old parish burial ground because he resided in a new district parish." During the trial the Lord Chief Justice, Mr. Justice Mellor, and Mr. Justice Crompton all agreed that burial was not wholly an ecclesiastical right (*b*). The case before them was one of a parish divided under 58 Geo. III. c. 45. It is submitted that the Legislature never could have contemplated depriving inhabitants of a newly-formed parish, where no burial ground or cemetery has been provided, of their rights in the old churchyard, whether the parish is subdivided under Church Building Acts or New Parishes Acts. Where a parish is divided under a local Act, the Act must be examined; where it is divided by Order in Council, made under the authority of an Act of Parliament, the Order in Council should be consulted.

7 & 8 Geo. IV. c. 72

By 7 & 8 Geo. IV. c. 72, s. 2, it is enacted:— "That it shall be lawful for the said commissioners to divide any parish or extra-parochial place into such ecclesiastical districts in manner provided by 58 Geo. III. c. 45; and if there shall not be any burial ground within such district, then and in every such case, until a burial ground shall be provided, the bodies of persons dying within such district may be interred in the cemetery of the parish church in all respects as if such division had not taken place" (*c*).

(*b*) Reg. *v.* Overseers of Walcot, 2 B. & S. 559.

(*c*) See p. 46, above, and Phillimore, 2170.

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Questions between incumbents of old and new parishes.

Where cemeteries have been provided questions have arisen between the incumbents of the old parish churches and those of newly-formed districts with regard to the fees for the burial of inhabitants of the newly-formed districts. See Glen's Burial Acts, and the cases of Hornby *v.* Toxteth Park (*d*), Vaughan *v.* South Metropolitan Cemetery Company (*e*), Edgell *v.* Burnaby (*f*), Day *v.* Peacock (*g*), Cronshaw *v.* Wigan Burial Board (*h*), Bowyer *v.* Stantial (*i*).

In the last-mentioned case it was held that under a local Act (*j*), constituting a cemetery company, the incumbent of the new ecclesiastical district was entitled to fees for interment of persons dying within the district, and buried in the cemetery, although no burial ground had ever been attached to the district, and although the incumbent did not inter the deceased persons.

Marriage.

In many divided parishes the fees of the newly-formed parishes differ from those of the mother church, so that it becomes important to consider in which church the inhabitants of the newly-formed parishes have a right to marry.

It seems that, both in *Distinct* and *District* parishes fully constituted such under 58 George III.,

(*d*) 31 L. J. N. S. Ch. 643.
(*e*) 30 L. J. N. S. Ch. 265.
(*f*) 23 L. J. N. S. Exch. 65.
(*g*) 34 L. J. N. S. C. P. 225.
(*h*) 8 L. R. Q. B. 217.
(*i*) 3 Ex. D. 315.
(*j*) 6 & 7 Wil'. IV. c. cxxix.

the marriage must take place in the district church, and not in the old parish church (*k*). The same rule holds good for the consolidated chapelries (*l*). In the case of new churches, built and constituted under the New Parishes Acts (see page 51), the question is more doubtful, as those Acts are rather confused. It seems, however, that where the commissioners have authorised marriages, and the incumbent of the new church is entitled to the whole of the fees, then the new church is the only place where the inhabitants of such districts may marry (*m*).

The Chancellor of the Diocese of Carlisle, in a letter to the Royal Commission on Marriage Law, stated that, as the new districts were formed for all ecclesiastical purposes, he considered that the inhabitants of new districts had lost their right to be married in the mother church (*n*).

The authorization by a bishop of marriage in a "public chapel" under 6 & 7 Will. IV. c. 85, s. 26, does not deprive inhabitants of the district belonging to such chapel of the right to be married in the mother church (*o*).

(*k*) See the conditions precedent in 58 Geo. III. c. 45, ss. 27—29, and see Phillimore, pp. 763, 767, 2181; Cripps, 678; Tuckniss *v.* Alexander, 32 L. J. N. S. Ch. 794.

(*l*) See Phillimore, 2182.

(*m*) 19 & 20 Vict. c. 104, ss. 14, 15 (Lord Blandford's Act).

(*n*) Report, App. p. 3. See also letter from Bishop of Rochester, App. p. 14.

(*o*) Reg. *v.* Perry, 3 E. & E. 640; 30 L. J. N. S. Q. B. 141; Phillimore, 765, 2177. See s. 31.

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Local Acts.

In many cases parishes have been subdivided by local Acts of Parliament. This was the case in Manchester. In every such case the local Act must be consulted. Even then it should be ascertained whether the fees authorised, directly or indirectly, thereby have been varied, or abolished, by any subsequent general Act.

CHAPTER X.

RECOVERY OF FEES.

In the Spiritual Court.

It would seem that a clergyman cannot refuse to perform his office, whether marriage, churching, or burial, because the fees are not paid (*p*).

No action can be brought for customary fees either in the County Court or Superior Court. They can be sued for in the Spiritual Court; if the custom is denied, the Civil Court will "prohibit" the Spiritual Court from proceeding, until it (the Civil Court) has tried the validity of the custom. If it decides that the custom is valid, it will then allow the Spiritual Court to proceed with the case (*q*).

When fees are authorised by Act of Parliament, of course it is not necessary to prove any custom.

Fees under 59 Geo. III. c. 134, s. 11 (*r*), may be sued for, and recovered, like ancient legal fees—*i.e.*, in the Spiritual Court. And by the New Parishes Act, 1843 (*s*), it would also seem that fees, authorised under that Act, must be recovered in the Spiritual

(*p*) Lynd. 278; Cripps 699; Waring *v.* Griffiths, 1 Burr. 444; Bowyer *v.* Stantial, 3 Ex. D. 321; see above, pp. 8, 11, and Canons 67-70 of 1603.

(*q*) Spry *v.* Gallop, 16 M. & W. 716; 16 L. J. N. S. Exch. 218; see above, p. 13.

(*r*) See above, p. 50.

(*s*) See above, p. 52.

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Court. Of course, if any Act of Parliament directs, in any case, that fees shall be recovered in a different way, its directions must be followed. Also, when there is a special agreement made, or privilege or consent given, it may be different (*s*).

When by action at law.

Thus where there has been an agreement that a certain sum shall be paid the incumbent if he consents to the burial of a non-parishioner, the money may (it seems) be recovered in the High Court, or the County Court, according to the amount (*t*).

If one person collects fees for another, they may, after the collector has received them, be recovered from the collector, by the person for whom he collects them, by action at law (*u*).

Mr. Dale expresses an opinion that "where the incumbent of an original parish improperly marries, etc., the parishioners of a new parish, and takes the fees, the incumbent of the latter parish can recover them at law" (*v*).

Whether recoverable before the magistrates.

By 2 & 3 Edw. VI. c. 13, s. 10, it was provided that all who by the laws and customs of the realm ought to pay offerings, shall yearly pay them to the incumbent of the parish at the four most usual offering days (*w*), or otherwise at Easter, and by

(*s*) See Chapters VI. and VII.

(*t*) See p. 40.

(*u*) Spry *v.* Emperor, 6 M. & W. 639.

(*v*) Dale, 193; see Aulton *v.* Roberts, 26 L. J. N. S. Exc. 380; King *v.* Alston, 12 Q. B. (A. & E.) 971.

(*w*) Christmas, Easter, Whitsunday, and the Feast of the Dedication of the Church.

7 & 8 Will. III. c. 6, and 53 Geo. III. c. 127, that every one shall henceforth pay all offerings, oblations, and obventions to those persons to whom they are due. And oblations are made recoverable before two justices of the peace, where their amount does not exceed £10 (*x*).

In the case of Quakers the arrears are recoverable before the justices up to the amount of £50 (*y*). By the same statutes, and by 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, no oblation can be recovered otherwise than before the justices unless the amount shall exceed £10, or in the case of Quakers £50, or unless some matter of title comes in question (*z*).

It was held in Ayrton *v.* Abbott (*a*) that mortuaries do not come within the words "offerings, oblations, and obventions," used in 7 & 8 Will. III. c. 6, s. 2. It is submitted that fees for marriage, burial, and the like, are not within these statutes. Mortuaries must not be confused with Burial Fees (*b*). Sir Robert Phillimore states that they are "closely analogous."

(*x*) 53 Geo. III. c. 127, s. 4.

(*y*) *Ib.* s. 6.

(*z*) See Stephen's Commentaries, ii. 743.

(*a*) 14 Q. B. (A. & E.) 1; 18 L. J. N. S. Q. B. 314.

(*b*) Ayrton *v.* Abbott, *ubi sup.*; Andrews *v.* Cawthorne. Willes, 537, note. See p. 81, below.

CHAPTER XI.

[43 & 44 Vict. c. 41.]

An Act to amend the Burial Laws. [7th September, 1880.]

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Whereas it is expedient to amend the law of burial in England and the Channel Islands:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows[1]:—

[1] Previous to this Act every person dying in the parish had a right to be buried in the churchyard, and, unless he died "unbaptised or excommunicate," or had "laid violent hands" on himself, with the Church of England service (*b*). Baptism by a layman or dissenting minister is sufficient if performed in the name of the Trinity with water (*c*). Persons committing suicide while insane are entitled to the service, and the coroner's jury are the proper persons to judge whether the deceased was sane or insane (*d*). It seems that a person dying when drunk is entitled to the service (*e*). Wherever the service might lawfully be used the deceased could not be

(*b*) Reg. *v.* Stewart; 12 A. & E. 773; Rex *v.* Coleridge, 2 B. & Ald. 809. See Rubric to Burial Service.

(*c*) Escott *v.* Mastin, 4 Moore, P. C. C. 104; 2 Curteis, 692.

(*d*) Burn, tit. "Burial," 6.

(*e*) *In re* Todd, Stephen's Statutes, 2011. See Phillimore, 858, and Cooper *v.* Dodd, 2 Rob. Ecc. Rep. 270.

interred with "silent burial" (*f*). No nonconformist minister or layman might officiate in the churchyard.

The new Act establishes a director or manager of the burial, and gives him important powers. He may require the interment to take place with some "Christian and Orderly" service performed by any person (s. 6), except a minister of the Church of England (s. 14), or with silent burial (s. 6).

The Ordinary may prescribe a burial service which may be used in any case where the Church burial service may not be used. Such prescribed service may also, at the request of the burial manager, be used in any case whatever (s. 13). As to registration, see ss. 10, 11.

The clergy of the Church of England may officiate with the Church burial service in unconsecrated ground (s. 12). The Act gives no new rights of interment where none formerly existed (s. 9), and preserves the powers already existing as to the position and making of the grave (s. 5), and as to keeping order (s. 8). All fees are likewise preserved (s. 5). Addresses, not being part of or incidental to a religious service, are forbidden (s. 7).

It has been stated, we believe on good authority, that burial grounds conveyed to trustees upon trust for such burials only as are conducted with the service of the Church of England are exempt from the operation of this Act (*g*). Compare as to burial grounds under trust deeds, s. 9, and as to proprietary cemeteries the last clause of s. 1.

It should be remembered in preparing trust deeds that a corporation, such as a rector or vicar and *successors*, cannot hold land except by a licence in mortmain or under some statute (*h*).

After passing of Act, notice may be given that burial

1. After the passing of this Act any relative, friend, or legal representative[1] having the charge of or being responsible for[2] the burial of a deceased

(*f*) Kemp. *v.* Wickes, 3 Phill. Rep. 264.

(*g*) See *Guardian*, Oct. 6, 1880, p. 1355.

(*h*) Wms. R. P. 11th edit., 76; Davidson, vol. v., pt. 2, p. 629, n.

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will take place in churchyard or graveyard without the rites of the Church of England.

person may give forty-eight hours' notice in writing, indorsed on the outside "Notice of Burial," to, or leave or cause the same to be left at the usual place of abode of the rector, vicar, or other incumbent, or in his absence the officiating minister in charge of any parish or ecclesiastical district or place, or any person appointed by him to receive such notice, that it is intended that such deceased person shall be buried within the churchyard or graveyard of such parish or ecclesiastical district or place without the performance, in the manner prescribed by law, of the service for the burial of the dead according to the rites of the Church of England, and after receiving such notice no rector, vicar, incumbent, or officiating minister shall be liable to any censure or penalty, ecclesiastical or civil, for permitting any such burial as aforesaid. Such notice shall be in writing, plainly signed with[3] the name and stating the address of the person giving it, and shall be in the form or to the effect of Schedule (A.) annexed to this Act.

The word "graveyard"[4] in this Act shall include any burial ground or cemetery vested in any burial board, or provided under any Act relating to the burial of the dead, in which the parishioners or inhabitants of any parish or ecclesiastical district have rights of burial; and in the case of any such burial ground or cemetery, if a chaplain is appointed to perform the burial service of the Church of England therein, notice under this Act shall be addressed to such chaplain, but the same shall be given to or left at the office of the clerk of

the burial board, if any, in whom any such burial ground or cemetery may be vested: Provided also, that it shall be lawful for the proprietors or directors of any proprietary cemetery or burial ground to make such bye-laws or regulations as may be necessary for enabling any burial to take place therein in accordance with the provisions of this Act, any enactment to the contrary notwithstanding.

[1] The term "burial manager" will be used as a convenient abbreviation for "any relative, friend, or legal representative having the charge of or being responsible for the burial of any deceased person." It should be observed that the "burial manager" must be "a relative, friend, or legal representative," as well as have "the charge of or be responsible for the burial." An executor may act before probate of the will (*h*).

[2] Every person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery.

It should seem that the individual under whose roof a poor person dies is bound to carry the body decently covered to the place of burial; he cannot keep him unburied, nor do anything which prevents Christian burial; he cannot, therefore, cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and, for the same reason, he cannot carry him uncovered to the grave (*i*).

If a parent has the means of providing Christian burial for his child he is bound to do so, but he is not bound to incur a debt for that purpose (*j*).

(*h*) Wms. Exs. 8th ed. 302.
(*i*) Reg. *v.* Stewart, 12 A. & E. 773.
(*j*) Reg. *v.* Vann, 21 L. J. N. S. M. C. 39.

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In case of a death within a hospital or other similar establishment it would seem that the duty is cast on the governing body of such establishment (*k*). Now, however, the burial manager may bury without any religious service (s. 6).

[3] The Act does not require the burial manager himself to sign the notice. It must, however, be signed with his name and by his authority.

[4] "Churchyard" includes any burial ground belonging to a church, though no church is within it. "Cemetery" is, properly speaking, a general word including churchyards and other burial grounds (see 35 Edw. I. stat. 2, and Reg. *v.* Stewart, p. 67, above), but it is now usually restricted to burial grounds other than churchyards (*l*). It is used in the restricted sense in this Act.

Paupers.

2. Such notice, in the case of any poor person deceased, whom the guardians of any parish or union are required or authorised by law to bury,[1] may be given to the rector, vicar, or other incumbent in manner aforesaid, and also to the master of any workhouse in which such poor person may have died, or otherwise to the said guardians, by the husband, wife, or next of kin of such poor person, who, for the purposes of this Act, shall be deemed to be the person having the charge of the burial of such deceased poor person; and in any such case it shall be the duty of the said guardians to permit the body of such deceased person to be buried in the manner provided by this Act.

[1] See Reg. *v.* Stewart, p. 67, above. The guardians are bound to pay the fees, if any payable.

(*k*) Reg. *v.* Stewart, *ubi sup.*; Glen, 25.

(*l*) Reg. *v.* Burial Board of Bishop Wearmouth, 5 Q. B. D. 67.

Time of burial to be stated, subject to variation.

3. Such notice shall state the day and hour when such burial is proposed to take place, and in case the time so stated be inconvenient on account of some other service having been, previously to the receipt of such notice, appointed to take place in such churchyard or graveyard, or the church or chapel connected therewith, or on account of any bye-laws or regulations lawfully in force in any graveyard limiting the times at which burials may take place in such graveyard, the person receiving the notice shall, unless some other day or time shall be mutually arranged within twenty-four hours from the time of giving or leaving such notice, signify in writing, to be delivered to or left at the address or usual place of abode of the person from whom such notice has been received, or at the house where the deceased person is lying, at which hour of the day named in the notice, or (in case of burial in a churchyard, if such day shall be a Sunday, Good Friday, or Christmas Day) of the day next following, such burial shall take place; and it shall be lawful for the burial to take place, and it shall take place, at the hour so appointed or mutually arranged, and in other respects in accordance with the notice: Provided that, unless it shall be otherwise mutually arranged, the time of such burial shall be between the hours of ten o'clock[1] in the forenoon and six o'clock in the afternoon if the burial be between the first day of April and the first day of October, and between the hours of ten o'clock in the forenoon and three o'clock in the afternoon if the burial be between the first day of October and the first day

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of April: Provided also, that no such burial shall take place in any churchyard on Sunday, or on Good Friday or Christmas Day,[2] if any such day being proposed by the notice shall be objected to in writing for a reason assigned by the person receiving such notice.[3]

[1] This will be Greenwich mean time, 43 & 44 Vict. c. 9.

[2] The special provisions as to Sundays, Christmas Day, and Good Friday, do not apply to public cemeteries as defined by section 1, p. 66.

[3] The objection must be made in writing, and *a reason* assigned.

Burial to take place accordingly.

4. When no such intimation of change of hour is sent to the person from whom the notice has been received, or left at the house where the deceased person is lying, the burial[1] shall take place in accordance with and at the time specified in such notice.

[1] Nothing is said in this Act as to tolling the bell. By canon 67 of 1603:—"When any [person] is passing out of this life, a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death, if it so fall out, there shall be rung no more than one short peal, and one other before the burial, and one other after the burial" (*m*). A constitution of Archbishop Winchelsea directs that the parishioners shall supply bells and ropes (*n*). High ecclesiastical authorities state that the churchwardens cannot order the bell to be tolled without the consent of the incumbent, but that the incumbent is bound to permit access to the church for the purpose of ringing the bell on proper occasions (*o*).

(*m*) See also Canon 88.

(*n*) Lynd., lib. iii., tit. 27, p. 252; Burn, tit. "Belis."

(*o*) Phillimore, 1756; Dale, 100.

Regulations and fees.

5. All regulations as to the position and making of the grave which would be in force in such churchyard[1] or graveyard in the case of persons interred therein with the service of the Church of England shall be in force as to burials under this Act; and any person who, if the burial had taken place with the service of the Church of England, would have been entitled by law to receive any fee, shall be entitled, in case of a burial under this Act, to receive the like fee in respect thereof.[2]

[1] The incumbent and perhaps the churchwardens have a discretion as to the place in the churchyard where the grave shall be made. The Civil Court will grant a Mandamus to bury, but not in any particular spot. See pages 15, 27, 28.

[2] The Act reserves all rights as to fees. If the Act is construed literally, it might give a fee in case of burial, under the Act, of persons, where a fee was not previously payable, because the service was not read. See opinion of the Archbishop of York, page 47, but see also page 78.

Burial may be with or without religious service.

6. At any burial under this Act all persons shall have free access to the churchyard or graveyard in which the same shall take place. The burial may take place, at the option of the person so having the charge of or being responsible for the same as aforesaid, either without any religious service, or with such Christian and orderly religious service at the grave as such person shall think fit[1]; and any person or persons who shall be thereunto invited,[2] or be authorised by the person having the charge of or being responsible for such burial, may conduct such service or take part in any religious act thereat.

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The words "Christian service" in this section shall include every religious service used by any church, denomination, or person professing to be Christian.[3]

[1] The burial manager can either cause the burial to take place silently or have a service, which must be both orderly and Christian.

[2] Except a minister of the Church of England. See s. 14.

[3] There can be no possible doubt that Unitarians and Quakers are included. Professed non-Christians, as Jews, Mahometans, Parsees, and professed Atheists, are excluded.

Burials to be conducted in a decent and orderly manner and without obstruction.

7. All burials under this Act, whether with or without a religious service, shall be conducted in a decent and orderly manner; and every person guilty of any riotous, violent, or indecent behaviour at any burial under this Act, or wilfully obstructing such burial or any such service as aforesaid thereat, or who shall, in any such churchyard or graveyard as aforesaid, deliver any address, not being part of or incidental to a religious service permitted by this Act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious service or otherwise, in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanour.

Powers for prevention of disorder

8. All powers and authorities now existing by law for the preservation of order, and for the pre-

vention and punishment of disorderly behaviour in any churchyard or graveyard, may be exercised in any case of burial under this Act in the same manner and by the same persons as if the same had been a burial according to the rites of the Church of England.[1]

[1] Brawling in churchyards is forbidden by 5 & 6 Edw. VI. c. 4 (now partly repealed), and 23 & 24 Vict. c. 32. The punishment under the latter Act for brawling in a churchyard, or burial ground, is a fine not exceeding £5, or imprisonment not exceeding two months. The offender may be forthwith apprehended by a constable or churchwarden of the parish or place, and taken before a magistrate (s. 3). The authority of the Ecclesiastical Court in cases of brawling by *laymen* is taken away (s. 1); but the power of the Ordinary over the churchyard remains (s. 7).

Act not to give right of burial where no previous right existed.

9. Nothing in this Act shall authorise the burial of any person in any place where such person would have had no right of interment if this Act had not passed,[1] or without performance of any express condition on which, by the terms of any trust deed,[2] any right of interment in any burial ground vested in trustees under such trust deed, not being the churchyard or graveyard, or part of the churchyard or graveyard, of the parish or ecclesiastical district in which the same is situate, may have been granted.

[1] Persons who do not die in the parish, and are not parishioners, cannot claim burial under this Act (see above, p. 22), unless they have a vault or grave by faculty or prescription authorising burial under such circumstances; but if the consent of incumbent and parishioners or churchwardens (see above, p. 39) be obtained, it seems they may be buried in accordance with this Act.

[2] See note above, p. 65.

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Burials under Act to be registered.

10. When any burial has taken place under this Act, the person so having the charge of or being responsible for such burial as aforesaid shall, on the day thereof, or the next day thereafter, transmit a certificate of such burial, in the form or to the effect of Schedule (B.) annexed to this Act, to the rector, vicar, incumbent, or other officiating minister in charge of the parish or district in which the churchyard or graveyard is situate or to which it belongs, or in the case of any burial ground or cemetery vested in any burial board to the person required by law to keep the register of burials in such burial ground or cemetery, who shall thereupon enter such burial in the register of burials of such parish or district, or of such burial ground or cemetery, and such entry shall form part thereof. Such entry, instead of stating by whom the ceremony of burial was performed,[1] shall state by whom the same has been certified under this Act. Any person who shall wilfully make any false statement in such certificate, and any rector, vicar, or minister, or other such person as aforesaid, receiving such certificate, who shall refuse or neglect duly to enter such burial in such register as aforesaid, shall be guilty of a misdemeanour.

[1] This is the ordinary printed heading to books for registry of burial. Entries made under this Act will state the name of the burial manager. Nothing will be said as to whether any religious service was performed, or who performed it. No provision is made in the Act for the sudden death, or illness, of the burial manager.

Order of coroner or certificate of registrar to be delivered to relative, &c., instead of to person who buries.

11. Every order of a coroner or certificate of a registrar given under the provisions of section seventeen of the Births and Deaths Registration Act, 1874,[1] shall, in the case of a burial under that Act,* be delivered to the relative, friend, or legal representative of the deceased, having the charge of or being responsible for the burial, instead of being delivered to the person who buries or performs any funeral or religious service for the burial of the body of the deceased; and any person to whom such order or certificate shall have been given by the coroner or registrar who fails so to deliver or cause to be delivered the same shall be liable to a penalty not exceeding forty shillings, and any such relative, friend, or legal representative, so having charge of or being responsible for the burial of the body of any person buried under this Act as aforesaid, as to which no order or certificate under the same section of the said Act shall have been delivered to him, shall, within seven days after the burial, give notice thereof in writing to the registrar, and if he fail so to do shall be liable to a penalty not exceeding ten pounds.

* *Query* this Act.

[1] 37 & 38 Vict. c. 88. The seventeenth section is as follows:—"A coroner, upon holding an inquest on any body, may, if he think fit, by order under his hand, authorise the body to be buried before registry of the death, and shall give such order to the relative of the deceased, or other person who causes the body to be buried, or to the undertaker or other person who causes the body to be buried, or to the undertaker or other person having charge of the funeral; and, except upon holding an inquest, no order, warrant, or other document for the burial of any body shall be given by the coroner.

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"The registrar, upon registering any death, or upon receiving a written requisition to attend at a house to register a death, or upon receiving such written notice of the occurrence of a death, accompanied by a medical certificate as is before provided by this Act, shall forthwith, or as soon after as he is required, give, without fee or reward, either to the person giving information concerning the death or sending the requisition or notice, or to the undertaker or other person having charge of the funeral of the deceased, a certificate under his hand that he has registered or received notice of the death, as the case may be.

"Every such order of the coroner and certificate of the registrar shall be delivered to the person who buries or performs any funeral or religious service for the burial of the body of the deceased; and any person to whom such order or certificate was given by the coroner or registrar who fails so to deliver or cause to be delivered the same shall be liable to a penalty not exceeding forty shillings.

"The person who buries or performs any funeral or religious service for the burial of any dead body, as to which no order or certificate under this section is delivered to him, shall, within seven days after the burial, give notice thereof in writing to the registrar, and if he fail so to do shall be liable to a penalty not exceeding ten pounds."

Liberty to use burial service of Church of England in unconsecrated ground.

12. No minister in holy orders of the Church of England shall be subject to any censure or penalty for officiating with the service prescribed by law for the burial of the dead according to the rites of the said church in any unconsecrated burial ground or cemetery or part of a burial ground or cemetery, or in any building thereon, in any case in which he might have lawfully used the same service, if such burial ground or cemetery or part of a burial ground or cemetery had been consecrated. The relative, friend, or legal representative having charge of or being responsible for the burial of any deceased

person who had a right of interment in any such unconsecrated ground vested in any burial board, or provided under any Act relating to the burial of the dead, shall be entitled, if he think fit, to have such burial performed therein according to the rites of the Church of England by any minister of the said church who may be willing to perform the same.[1]

[1] This section enables ministers of the Church of England to officiate in other parishes without the consent of the incumbents of such parishes, but only in unconsecrated ground.

Relief of clergy of Church of England from penalties in certain cases.

13. From and after the passing of this Act, it shall be lawful[1] for any minister[2] in holy orders of the Church of England authorised to perform the burial service, in any case where the office for the burial of the dead according to the rites of the Church of England may not be used,[3] and in any other case at the request of the relative, friend, or legal representative having the charge of or being responsible for the burial of the deceased,[4] to use at the burial such service, consisting of prayers taken from the Book of Common Prayer and portions of Holy Scripture, as may be prescribed or approved of by the Ordinary,[5] without being subject to any ecclesiastical or other censure or penalty.

[1] The section is apparently merely permissive. See Julius *v.* Bishop of Oxford, 5 App. Cas. 214.

[2] It would seem that this does not authorise a minister of the Church of England to officiate in the churchyard of another incumbent without such incumbent's consent. See s. 14.

[3] *i.e.*, for unbaptized, excommunicate, and suicides; see above, p. 64.

[4] Even in case of a person entitled to the burial service the

Chap. XI.

minister may, at the request of the burial manager, use the bishops' service instead of it.

[5] The bishops may prescribe different services. No bishop is bound to prescribe any service, and no minister of the Church of England is bound to use any service when prescribed by any bishop.

Saving as to ministers of Church of England.

14. Save as is in this Act expressly provided as to ministers of the Church of England,[1] nothing herein contained shall authorise or enable any such minister who shall not have become a declared member of any other church or denomination, or have executed a deed of relinquishment under the Clerical Disabilities Act, 1870,[2] to do any act which he would not by law have been authorised or enabled to do if this Act had not passed, or to exempt him from any censure or penalty in respect thereof.

[1] See sections 12 and 13.
[2] 33 & 34 Vict. c. 91.

Application of Act.

15. This Act shall extend to the Channel Islands, but shall not apply to Scotland or to Ireland.

Short title of Act.

16. This Act may be cited as the Burial Laws Amendment Act, 1880.

NOTE.—It should be mentioned that some consider that burial fees are paid, not for the service, but for (or rather *after*) breaking the soil; see pp. 11, 12. If so, a fee might, even independently of the Act, be payable, although the service is not read.

SCHEDULE (A.)

Notice of Burial.

I , of , being the relative [*or* friend, *or* legal representative, *as the case may be, describing the relation if a relative,*] having the charge of or being responsible for the burial of *A. B.*, of , who died at in the parish of , on the day of , do hereby give you notice that it is intended by me that the body of the said *A.B.* shall be buried within the [*here describe the churchyard or graveyard in which the body is to be buried,*] on the day of , at the hour of , without the performance in the manner prescribed by law of the service for the burial of the dead according to the rites of the Church of England, and I give this notice pursuant to the Burial Laws Amendment Act, 1880.

To the Rector [*or, as the case may be,*] of .

SCHEDULE (B.)

I , of , the person having the charge of (*or* being responsible for) the burial of the deceased, do hereby certify that on the day of , *A.B.*, of , aged , was buried in the churchyard [*or* graveyard] of the parish [*or* district] of .

To the Rector [*or, as the case may be,*] of .

APPENDICES.

APPENDIX I.

Some Ancient English Canons.

Canon made in King Edgar's reign, A.D. 960.

And let no man be buried in a church, unless it be known that he in his lifetime have so pleased God that men on that account allow him to be worthy of such a burying place (Johnson's Ecclesiastical Laws, i., 417; see also ii., 9).

Canons at Eanham, A.D. 1009.

And it is most just that men pay the soul scot at the open grave.

And if the corpse be buried elsewhere out of the proper district (shire) let the soul scot then be paid notwithstanding to the minister to which it belonged (Johnson, i., 483; see The Laws of Canute, Spelman's Concilia, 564).

[It is presumed that this *soul scot*, or *soul shot*, was the origin of mortuaries, see Phillimore, 873, and page 63, above.]

Archbishop Anselm's Canons at Westminster, A.D. 1102.

That corpses be not carried out of their parishes to be buried so that the priest of their parish lose his just dues (Johnson, ii. 28; Conf. Decretal, lib. iii., tit. 28, c. 5, 6).

Archbishop Corboyl's Canons at London, A.D. 1126.

We charge that no price be demanded for chrism, oil, baptism, visiting or anointing the sick, for the Communion of the Body of Christ, or for burial (Johnson, ii., 35).

Legatine Canons at Westminster, A.D. 1138.

Following the canonical institutes of the fathers we forbid by apostolical authority any price to be demanded for chrism, oil, baptism, penance, visitation of the sick, espousals of women, unction, Communion of the Body of Christ, or burial, under pain of excommunication (Johnson, ii., 42).

Archbishop Richard's Canons, A.D. 1175.

The holy synod detests simoniacal heresy and ordains that nothing be demanded for orders, chrism, baptism, unction, burial, communion, nor the dedication of a church, but that what is freely received be freely given; let the offender be anathema (Johnson, ii., 61).

Archbishop Walter's Canons at Westminster, A.D. 1200.

According to the Lateran Council we forbid anything to be demanded for inducting or instituting priests, or other clerks, for burying the dead, or giving the nuptial benediction, or any of the sacraments; let the offender have his portion with Gehazi (Johnson, ii., 89).

Legatine Constitutions of Otto (Otho), A.D. 1237.

We ordain and charge that the sacraments of the Church . . as also the consecrated oil and chrism, be purely and devoutly administered by the ministers of the Church without any spice of covetousness under pretence of a custom, by which say they, they who receive these sacraments make certain payments to certain persons . . The principal sacraments are baptism, confirmation, penance, the Eucharist, extreme unction, matrimony, and orders (Johnson, ii., 153; see, however, ii., 156).

[For constitution of Stephen Langton, A.D. 1222, see above, p. 11; and for constitution of Simon Mepham, A.D. 1328, see above, p. 23, note.]

APPENDIX II.

Some Instances of Fees or Offerings in the Fourteenth Century.

The following extracts are made from the work of Professor Thorold Rogers on Agriculture and Prices, pages 580, 582.

A.D. 1340. *Bicester Vicarage.*

Ecclesiastical Fees.

Sponsalia, John Brown, 2*s.*

Burying.

Two children at 2*s.**
Wm. Gardiner's child, ¾*d.*
A Poor Man of Stratton, 1½*d.*
Symon, the farmer of Bygenall's son, 1*s.* 6*d.*

A.D. 1361. *Bicester.*

Ecclesiastical Fees.

Burials, 9*s.* 3*d.*, 1*s.* 5*d.*, 5½*d.*, 1*s.* 2*d.*
Weddings, 5*s.* 3*d.*, 5*s.*, 3*s.*, 3*s.* 4*d.*
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* This means 2*s.* each.

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